

CHAPTER 1

The Role of African Courts and Judges in Arbitration

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INTRODUCTION

This chapter examines the relationship between national courts and arbitration with reference to African States, the primary geographical focus of this book. It particularly examines whether courts in Africa can or should support arbitration and if yes how they can provide such support within their juridical space taking into account their developmental state. To answer these questions, this chapter briefly examines the evolution of the dispute resolution processes of arbitration and litigation in African States (§1.01); and the nature of arbitration in the legal systems of African States (§1.02). It examines the roles of the arbitrator and the judge in arbitration and argues the need for courts in African States to support the development and growth of arbitration in their respective jurisdictions (§1.03). It also suggests some ways courts can better support the growth of arbitration in African States (§1.04). It concludes that there is evident progress made with the appreciation of arbitration by judges in Africa. However, the interaction between the judiciary and arbitration practitioners must continue as this will assure the sustainability of the gains already achieved.

The discussions in this chapter will primarily refer to the UNCITRAL (United National Commission for International Trade Law) Model Law for International Commercial Arbitration (1985 and its revised 2006 version) which has been adopted by eleven African States (UNCITRAL Model Law);¹ the OHADA (Organisation for the Harmonisation of Business Law in Africa) Uniform Arbitration Act 1999 (as revised on

1. These are: Egypt, Kenya, Madagascar, Nigeria, Tunisia, Uganda, Zambia and Zimbabwe (1985 version); Mauritius and Rwanda (2006 version) and the 2017 South Africa International Arbitration Act which is also based on the 2006 version of the UNCITRAL Model Law.

23 November 2017²), which applies in the seventeen OHADA Member States (OHADA UAA);³ the Ghana Alternative Dispute Resolution Act 2010 which is modern with some independent features (Ghana ADRA);⁴ the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958, which has been implemented in thirty-eight African States (New York Convention).⁵ It will also refer to specific national laws and decisions from courts in Africa⁶ and other jurisdictions where particularly relevant; the UNCITRAL Arbitration Rules (1976 and 2010 revision) which form the basis of the vast majority of arbitration rules adopted in Africa; the arbitration rules of specific institutions where relevant; and to African and other commentators on arbitration.

§1.01 ARBITRATION AND LITIGATION IN AFRICAN STATES

Arbitration as a mechanism for dispute resolution is usually compared with litigation before national courts. This is on the grounds of the similarities between both processes. Both processes are adjudicatory in nature and conclude in a final and binding decision made by a neutral third party for the disputants. They both are regulated by the State and their outcomes are also enforced through the coercive mechanisms of the State. In both processes therefore, the legislative and executive arms of government play major roles.⁷ This is in addition to the leading role played by the decision-makers: the judge in litigation and the arbitrator in arbitration. These similarities also allude to the tensions existing between both processes and their seeming competition over the same juridical space. It is these tensions that make it necessary to interrogate their possible harmonious co-existence within the same juridical space. For Francis Botchway, these tensions between national courts and arbitral tribunals can be resolved, ‘if there were clear and authoritative rules that

2. The New Uniform Act on the Law Relating to Arbitration was adopted in Conakry on 23 November 2017 and will come into force ninety days therefrom (i.e., sometime in early 2018). The 1999 UAA will be referred to except where the relevant provision differs under the revised UAA 2018.

3. These are: Benin, Burkina Faso, Cameroon, Central Africa Republic, Chad, Comoros, Republic of Congo, Cote d’Ivoire, Democratic Republic of Congo, Equatorial Guinea, Gabon, Guinea, Guinea-Bissau, Mali, Niger, Senegal, and Togo.

4. The text of the Ghana Alternative Dispute Resolution Act 2010 is available at: <http://www.wipo.int/wipolex/en/details.jsp?id=15113>.

5. These are: Algeria, Angola, Benin, Botswana, Burkina Faso, Burundi, Cameroon, Central Africa Republic, Comoros, Cote d’Ivoire, Democratic Republic of Congo, Djibouti, Egypt, Gabon, Ghana, Guinea, Kenya, Lesotho, Liberia, Madagascar, Mali, Mauritania, Mauritius, Morocco, Mozambique, Niger, Nigeria, Rwanda, Sao Tome & Principe, Senegal, South Africa, Tanzania, Tunisia, Uganda, Zambia, and Zimbabwe. The New York Convention will enter into force for Sudan and Cabo Verde in June 2018.

6. To avoid repetition, very few cases will be discussed because the chapters below on specific jurisdictions examine the cases in greater detail.

7. This is primarily through the enactment of legislations, ratification of international conventions, and exercise of police powers of the State.

indicate the structure of the relations between both systems'.⁸ Since there are no such rules currently in existence in African States, it is important to explore other means to achieve the desired co-existence between both mechanisms. This section briefly describes the dispute resolution processes of arbitration (section A) and litigation (section B) in Africa and highlights some of the tensions existing between both processes (section C).

[A] Arbitration

Modern arbitration⁹ is an adjudicative private dispute resolution mechanism adopted by disputants, with private individuals making binding decisions that may be recognised, enforced and executed through the machineries of a sovereign state.¹⁰ This description of arbitration clearly alludes to the fact that it is a process or mechanism for resolving disputes. This implies that arbitration is triggered when a dispute between two or more individuals or legal entities eventuates. It is therefore the availability of this process to persons or entities who have a subsisting dispute which they require resolution by a neutral third party, the arbitrator or arbitrators, that is the essence of arbitration.

This description presupposes some form of prior relationship or interaction between the persons or entities before the dispute arises. The existence of the dispute transforms the parties into *disputants*. Arbitrators form the panel of decision-makers, the arbitral tribunal, who finally determine the dispute between the disputants. Since the decision made by the arbitral tribunal is amenable to recognition by a national court, this mechanism also involves a state.¹¹ The state is not party to the arbitration process (except where the state itself is a disputant) but makes laws to guide any arbitral process conducted within its territory.¹² Through the exercise of this regulatory function, the state, for example, safeguards its own concept of due process (substantive

8. Francis Botchway, 'African National Courts, International Arbitral Tribunals and the Quest for Harmonious Relations' in R.F. Opong and K. Agyebeng (eds), *A Commitment to Law, Development and Public Policy: A Festschrift in Honour of Nana Dr SKB Asante* (Wildy Simmonds and Hill Publishing, 2016) 206–221.

9. This Chapter does not explore customary arbitration in Africa on which see for example, Teslim O. Elias, *The Nature of African Customary Law* (Manchester University Press, 1956); Virtus C. Igbokwe, *The Law and Practice of Customary Arbitration in Nigeria: Agu v. Ikwibe and Applicable Law Issues Revisited* *Journal of African Law*, Vol. 41, 201–214 (1997). Andrew Chukwuemerie, *The Internationalisation of African Customary Law Arbitration African*, *Journal of International and Comparative Law*, Vol. 14, 143–175 (2006); Roland Amoussou-Guenou, *The Evolution of Arbitration Laws in Francophone Africa*, *Arbitration*, Vol. 64, No. 1, 62–66 (1998).
10. For examples of descriptions of arbitration, see Julian D.M. Lew, Loukas A. Mistelis and Stefan M. Kroll, *Comparative International Commercial Arbitration* (Kluwer Law International, 2003) 3–5; J.O. Orojo and M.A. Ajomo, *Law and Practice of Arbitration and Conciliation in Nigeria*, (Mbeyi & Associates, 1999) 3.
11. Thirty-eight African countries are now members of the New York Convention, Article III of which require them to recognise and enforce arbitral awards. In addition, all known national arbitration laws in the continent include provisions for the enforcement of awards. The Convention will enter into force in Sudan on 24 June 2018 and in Cabo Verde on 20 June 2018.
12. Every African State, with the exception of Sierra Leone, has identifiable specialised law on arbitration or ADR.

and procedural).¹³ The state acts in the capacity of ‘guardian’ or ‘custodian’ of the mores of its people as part of its sovereign attribute.¹⁴

The *state* here is not defined. This is because in international transactions, two or more states may be connected to the reference,¹⁵ and any one of such connected states may become relevant at various stages of the arbitral reference.¹⁶ This analysis also raises the issue of arbitrability of the subject matters on which disputes can be arbitrated as permitted by states in their sovereign capacity. In the current liberal economic dispensation, most disputes of a *private* nature may be arbitrated.¹⁷ However, there are still subject matters that a particular state or economic bloc may consider of great importance to its (usually economic) interest that disputes from such subject matters are removed from the private dispute settlement domain.¹⁸ A state may put in place a statutory arbitration tribunal to determine disputes arising from such matters or leave them to the exclusive jurisdiction of its courts.¹⁹ The importance of the issue of objective arbitrability impacts on the different types of juridical theories of arbitration briefly discussed below.²⁰

The description of arbitration under consideration referred to arbitration as a private process. This is to distinguish it from litigation which is a public process. In this sense, arbitration is private between the disputants only and any other third parties they involve in the process.²¹ Such third parties include their legal advisors or representatives, the witnesses of fact, expert witnesses, and administrative assistants.

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13. For example, see Kariuki Muigua, *Settling Disputes Through Arbitration in Kenya* (Nairobi: Glenwood Publishers 2012) 169–172, argues the need for the courts to intervene in arbitration in the public interest.
 14. This sovereign attribute has the attendant effect that the substantive dispute must be over a subject matter deemed capable of settlement by arbitration by the State. See Lew, Mistelis and Kroll, *supra* n. 10, 188.
 15. Either as the seat of arbitration or place of enforcement of the award.
 16. Any of these States may become relevant either before, during or after the arbitral proceeding.
 17. See generally Loukas A. Mistelis and Stavros L. Brekoulakis (eds), *Arbitrability: International & Comparative Perspectives* (Kluwer Law Int’l 2009).
 18. See for example, Paul Obo Idornigie and A. Adewopo, *Arbitrating Intellectual Property Disputes: Issues and Perspectives*, The Gravitas Review of Business & Property Law, Vol. 17, No. 1, 9–13 (2016). Tax matters have also been held inarbitrable by Nigerian courts in a string of cases involving the Nigerian National Petroleum Corporation (NNPC): *Shell Nigeria Exploration & Production Co Ltd & Others v. Federal Inland Revenue Service & Another*, CA/A/208/2012, and *Esso Exploration and Production Nigeria Ltd & Another v. Nigerian National Petroleum Corporation*, CA/A/507/2012; *Statoil Nigeria Ltd v. Nigerian National Petroleum Corporation* (2013) 7 CLRN 72; *Nigerian Agip Exploration Ltd v. Nigerian National Petroleum Corporation* (2014) 6 CLRN 150. See also the list of inarbitrable matters under section 1 Ghana ADRA. See also Chinedum Umeche, *Arbitrability of Tax Disputes in Nigeria*, Arbitration International, Vol. 33 No. 3, 497–502, (2017) for a discussion of these cases.
 19. An example of a statutory arbitral panel is the Nigerian Tax Appeal Tribunals established pursuant to section 59(1) of the Federal Inland Revenue Service (Establishment) Act 2007.
 20. These matters engage the arguments on transnational, international and domestic public policies, and whether states (particularly in international arbitration) should only refer to international public policy. See for example, the *International Law Association (ILA) 2002 Report*, International Law Association Reports of Conferences, Vol. 70, 352–379 (2002).
 21. This attribute of privacy makes decisions such as *Statoil Nigeria Ltd and Another v. Federal Inland Revenue Service and Another* (2014) LPELR-23144 by the Nigerian Court of Appeal particularly worrying. On this case, see the blog by Funke Adekoya, Third Party Rights – Arbitrability, Locus Standi and Precipate Action in Arbitration Proceedings in Nigeria available

A non-interested third party (e.g., a member of the public) cannot therefore wander into the hearing (as any individual can wander into a public courtroom) to listen or watch the proceedings or be apprised of same and its outcome.²² In the same manner, the arbitral award is the *private property* of the disputants and, so it is not made publicly available (at least not without their consent²³) as are court judgments.

Privacy of the process is not unique to arbitration but common to other private dispute resolution processes such as mediation, conciliation, and early neutral evaluation.²⁴ However, as compared to these alternative dispute resolution (ADR) processes, arbitration is adjudicative²⁵ and terminates in a binding decision recognised by the disputants as final and binding on them, and by states as having *res judicata* effect.²⁶ Most African jurisdictions grant the same status of finality to final arbitral awards just as judgments of their national courts.²⁷ The current ‘backlash’ against international (investment) arbitration has roots in the private (or confidential) nature of the arbitral process, its adjudicative nature, the currency of its resultant award, and its impact on public interest issues.²⁸

The discourse on transparency is particularly acute in investment arbitration.²⁹ This may be because of the very nature of investment disputes which usually involves a state or state-owned entity; its subject matter impacts on the public interest; its outcome usually affects the citizens of the host state; and it impacts on the exercise of the regulatory powers of the host state.³⁰ These issues have also led to the ascription of the theory of new constitutionalism to explain the current state of international investment arbitration and its practitioners (described as a form of *mercatorocracy*³¹) in

at <http://blogaila.com/2014/12/10/third-party-rights-arbitrability-locus-standi-and-precipitate-action-in-arbitration-proceedings-in-nigeria-by-funke-adekoya-san/> (accessed 30 September 2017).

22. For example, through published law reports. Moreover, in some developed jurisdictions such as England, court hearings are now freely available on the internet and YouTube for the public to watch.
23. See for example, section 49(7) Ghana ADR Act which provides for public access to awards with the consent of the parties.
24. Henry Brown and Arthur Marriott, *ADR: Principles and Practice*, (3rd ed., Sweet & Maxwell, 2011) 37, note that ‘confidentiality of process runs through all approaches’ of ADR.
25. The alternative dispute resolution processes of mediation, conciliation, early neutral evaluation are not adjudicative in nature. Adjudication implies that the arbiter reviews evidence and makes a decision which do not form part of these ADR processes.
26. Non-adjudicative ADR processes (of mediation and conciliation for example) do not terminate in a binding decision and do not have the same status as court judgments or arbitral awards.
27. See Article 35(1) Model Law; Article 23 OHADA UAA; section 52 Ghana ADRA.
28. For example, the public debates on the Transatlantic Trade and Investment Partnership (TTIP) negotiations between the European Union and the United States of America. See *The Independent Newspaper* of 6 October 2015, available at <http://www.independent.co.uk/voices/comment/what-is-ttip-and-six-reasons-why-the-answer-should-scare-you-9779688.html>.
29. See for example, UNCTAD Series on Issues in International Investment Agreements II on Transparency, United Nations Publication, 2012.
30. For example, the public statement issued on 31 August 2010 signed by seventy-six academic and other professionals concerned about the current investment law regime at <http://www.osgoode.yorku.ca/public-statement-international-investment-regime-31-august-2010/> (assessed 30 September 2017).
31. See Cutler A. Clare, ‘International Commercial Arbitration, Transnational Governance, and the New Constitutionalism’, in Mattli W and Dietz T (eds), *International Arbitration and Global*

the larger economic and political discourse.³² This theory transposes the politics scholarship on new constitutionalism to its analysis of investment arbitration. One premise of the theories on new constitutionalism is:

[T]he constitutionalization of certain economic liberties as a means of promoting a neoliberal agenda of open markets, economic deregulation, antistatism, and anticollectivism...³³

The proponents of the new constitutionalism theory argue that with the investment law regime, powerful economic players (investors) and elites such as arbitration lawyers in international law firms, arbitrators and arbitration institutions, in protecting their self-interest and to retain relevance in society, have lobbied to ensure the demise of the regulatory powers of the state against the increasing protections granted to investors in various constitutions, so that the interest of investors override those of the state and its citizens.³⁴ In doing this, these mercatocrats have presented investment as the new ‘common sense’ while ‘reconfiguring the domains of public and private authority’. So effectively these mercatocrats *sell* investments as a good thing for states and their citizens, all in furtherance of the interest and evolution of capitalism and the ruling classes.³⁵ Clare Cutler in recognising that, with the publication of arbitral awards,³⁶ acceptance of *amici curiae* briefs and greater transparency in public law related arbitration references,³⁷ and with some states withdrawing from the

Governance, (OUP, 2014) 142, where she described *mercatorocracy* as, ‘comprised of transnational merchants, private international lawyers and other professionals and their associations, government officials, and representatives of international organizations who operate locally and globally to develop, harmonize, and universalize systems of commercial laws and dispute resolution practices’. (References omitted.)

32. See the various contributors in Mattli W and Dietz T (eds), *International Arbitration and Global Governance*, (OUP, 2014); in particular Moritz Renner, *Private Justice, Public Policy: The Constitutionalization of International Commercial Arbitration*, Chapter 5 at 133, where he noted that ‘the increasing publication of awards enables the development of a genuinely legal form of reasoning based on precedent, generating normative expectations as well as greater doctrinal consistency’, as evidencing the rise of hierarchy of norms in arbitration and the structural coupling of law and politics in support of the theory; and Cutler A.C., *International Commercial Arbitration, Transnational Governance, and the New Constitutionalism*, Chapter 6 at 147, in which she highlighted the inequalities of investment arbitration and argued that ‘the investor-state regime privatizes dispute settlement by identifying specialized arbitration institutions that operate like a private justice system, with significant autonomy from national legal systems’.
33. See Hischel Ran, *The Political Origins of the New Constitutionalism*, Indiana Journal of Global Legal Issues, Vol. 11, No. 1, 71, 90 (2004).
34. It is doubtful that these *mercatorocrats* control such powers. In this author’s view, it is states that agree to such provisions and should take responsibility for their outcomes.
35. See Cutler A. Clare, *supra* n. 32 at 152.
36. This push resulted in the 2013 UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration and the United Nations Convention on Transparency in Treaty-based Investor-State Arbitration, 17 March 2015 (made in Port Louis, Mauritius) which entered into force on 18 October 2017.
37. See, for ICSID cases, <https://icsid.worldbank.org/en/Pages/cases/AdvancedSearch.aspx>; for NAFTA cases Todd Weiler’s website at <http://www.naftaclaims.com/>. For examples of cases that admitted *amici curiae* briefs, see *Methanex v. United States of America* (2001) with documents available at <http://www.state.gov/s/l/c5818.htm>; *Biwater Gauff (Tanzania) v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, available at [8](https://icsid.worldbank.org/ICSID/FrontServlet; Vivendi v. Argentina, ICSID Case No. ARB/97/3, available at https://

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investor-state arbitration regime,³⁸ while others draft new investment laws,³⁹ concludes that these:

suggest a rethinking of the assumptions concerning the neutrality of international commercial law and practice and suggests a more critical understanding of the nature of the separations between economics and politics and the private and public spheres.⁴⁰

The foundations of the views of the new constitutionalists resonate with this author's views on the pre-eminence given to foreign investors and the imbalance in the rights and obligations of the parties as provided in international investment agreements (IIAs) with reference to African States.⁴¹ The impact of the current international investment regime on African States is evident from the number of disputes against them over the years and their outcomes. Using ICSID as an example, their recent statistics show that as at the end of May 2017, 135 of their 613⁴² cases involve an African State party.⁴³ This amounts to 22% of their total caseload, with 21% of these cases filed by African investors against African States. This evidences the participation of African investors in the international investment regime (in which participation will also increase with the increase of intra-Africa trade and investment). On outcomes, 42% of these cases were settled by the parties or discontinued while final awards were issued in the remaining 58%. Of the concluded cases, 22% declined jurisdiction, 22% dismissed all claims and 56% upheld the claims. However, the data did not include the amounts awarded against the African States.⁴⁴ The ICSID statistics also reveal the very poor participation of Africans as arbitrators or counsel.⁴⁵

icsid.worldbank.org/ICSID/FrontServlet; and recently in *Pac Rim Cayman LLC v. Republic of El Salvador*, ICSID Case No. ARB/09/12 available at <https://icsid.worldbank.org/ICSID/FrontServlet>.

38. For example, the Latin American States of Ecuador, Venezuela, and Bolivia that have withdrawn from the ICSID regime.
39. For example, South Africa terminated its BITs with mainly European countries (those with Russia and China remain subsisting) and promulgated the Protection of Investment Act 22 of 2015.
40. Cutler, *supra* n. 32 at 166.
41. For this author's views and those of other African arbitration lawyers, see Victoria L. Safran, *African Voices on Cultural Issues Impacting the Role of Africans and Africa in International Arbitration*, Transnational Dispute Management Vol. 13, No. 4, 36 (2016).
42. This number of cases is impressive when it is recalled that before 1997 ICSID registered less than five cases per year and its first case was filed in 1977.
43. Forty-five per cent of these cases were based on BITs, 39% were based on investment contracts between the investor and host state while 16% were based on the investment law of the host states. For more details, see ICSID Caseload-Statistics (Special Focus-Africa) available at: [https://icsid.worldbank.org/en/Documents/resources/ICSID%20Web%20Stats%20Africa%20\(English\)%20June%202017.pdf](https://icsid.worldbank.org/en/Documents/resources/ICSID%20Web%20Stats%20Africa%20(English)%20June%202017.pdf).
44. The remaining 79% were filed by non-African investors.
45. According to the ICSID Statistics, Special Focus on Africa, May 2017, only 'about 4%' of all ICSID appointments were nationals of an African State despite these states accounting for 22% of ICSID cases. There is hope for positive change when on 15 September 2017 the ICSID Chairman in his designations to ICSID Panels appointed some Africans on the ICSID Arbitrator Panel (Olufunke Adekoya) and on the ICSID Conciliator Panel (Mohamed Abdel Raouf and Phillip Aliker). We should also note that Marie-Andree Ngwe (on the Conciliator Panel) resides in Cameroon.

This push for greater transparency in international investment disputes will continue and rightly so for the various reasons given in support of such move.⁴⁶ The public outburst and media engagement in Europe (and the United States of America) over the Transatlantic Trade and Investment Partnership (TTIP) negotiations,⁴⁷ and the inclusion of Investor-State-Dispute-Settlement (ISDS) mechanism of arbitration, increased the media scrutiny of the international arbitration regime globally.⁴⁸ It is this same public engagement and backlash of investment arbitration that is driving the current initiatives on finding alternatives, and pushing this issue up the agenda of international investment law reform proposals. One of such proposals is the possibility of creating an investment court system (ICS).⁴⁹ This idea was mooted by the United Nations Conference on Trade and Development (UNCTAD) in its *World Investment Report* (WIR) 2015⁵⁰ and has now been taken up by the European Union.⁵¹

This continued push for greater transparency may however also impact on commercial arbitration. Indeed, there are some signs of such impact or influence as more arbitration institutions now include greater details in their published statistics. One example is on gender equality.⁵² Some institutions publish awards under their Arbitration Rules although in a redacted form and with the consent of the disputants.⁵³ In addition to these, is the introduction and popularity of arbitration related soft news

46. See generally, Dimitrij Euler, Markus Gehring, and Maxi Scherer (eds), *Transparency in International Investment Arbitration* (Cambridge University Press, 2015).

47. The Transatlantic Trade and Investment Partnership (Trade in Services, Investment and E-Commerce) between the EU and US. See the EU database: http://ec.europa.eu/trade/policy/in-focus/ttip/index_en.htm.

48. *Supra* n. 27 above. See also <http://www.waronwant.org/what-ttip>.

49. See for example, Gabrielle Kaufmann-Kohler and Michele Potesta, *Can the Mauritius Convention Serve as a Model for the Reform of Investor-State Arbitration in Connection with the Introduction of a Permanent Investment Tribunal or an Appeal Mechanism?* available at http://www.uncitral.org/pdf/english/CIDS_Research_Paper_Mauritius.pdf (accessed 20 December 2017).

50. UNCTAD World Investment Report 2015, *Reforming International Investment Governance*, 152–153. It is noted that H.J. Abs, *Proposals for Improving the protection of Private Foreign Investments*, Institut International d'Etudes Bancaires, Rotterdam (1958) 31, proposed the creation of a specialist international court of economists and bankers.

51. The EU-Canada Comprehensive Economic and Trade Agreement (CETA) includes provisions for an investment court as does the current negotiations between the EU and Japan on an Economic and Partnership Agreement. See for the efforts on the African continent in this regard, Chrispas Nyombi in Chapter 5 below on the need for a regional investment court for Africa.

52. This involves providing data on the number of women appointed as arbitrators especially for those institutions that have signed up to the *Equal Representation Pledge* sponsored by the Arbitral Women organisation. See the 2017 statistics of the Arbitration Institute of the Stockholm Chamber of Commerce (SCC) with the appointment of 18% of the arbitrators being women. This Statistics is available on their website: <http://www.sccinstitute.com/statistics/> (accessed 13 April 2018). For the LCIA, in 2017, 24% of arbitrator appointments were women. This statistics is available on their website: <http://www.lcia.org/LCIA/reports.aspx> (accessed 13 April 2018).

53. See for example, the Cairo Regional Centre for International Commercial Arbitration (CRCICA), which publishes awards made under their arbitration rules in Arabic, and the ICC Collection of Awards. See also the LCIA's publication in 2011 of its arbitrator challenge digests in, *Arbitration International*, Vol. 27, No. 3, pp. 283–473 (2011), which was on arbitrator challenge applications and decisions of the LCIA Court (now updated on their website). The SCC recently announced it will also publish its arbitrator challenge decisions.

publications such as GAR⁵⁴ and Law360⁵⁵ and several arbitration focused blogs.⁵⁶ These publications (most of which are subscription based) make arbitration related news, such as information on arbitration filings, identities of the parties, members of the tribunal, and outcome of hearings, immediately available to their subscribers. With specific Africa focus, I-Arb Africa provides a database with Africa-related arbitration information and news.⁵⁷ All these media outlets make arbitration related information more easily accessible and available to practitioners, researchers, policy makers and the public, and support the move towards greater transparency in arbitration.

It must be mentioned that privacy and confidentiality are not the same concepts generally in law and more particularly in arbitration. Arbitration though private, is not necessarily confidential.⁵⁸ Confidentiality refers to the legal or contractual obligation or undertaking by the disputants and other participants in the arbitration not to disclose information, material, or documents relating to the arbitration to third parties, upon pain of sanctions.⁵⁹ This is a legal or contractual obligation that can be imposed or undertaken by the disputants themselves, arbitrators, arbitration institutions, witnesses, and administrative staff. Basically, all those that play one role or the other in the arbitral reference through, or from which they become acquainted with any relevant information, material or document requiring such protection.⁶⁰

The issue that arises with confidentiality is that there is no uniform or harmonised regime or international standard on matters of confidentiality in international arbitration as confirmed by the International Law Association (ILA) survey.⁶¹ This is an issue that falls within the remit of both party autonomy and national laws (usually the law of the seat of arbitration). There have also been court decisions on whether the arbitral hearing, the award, materials and documents are confidential or not, which reveal the divergent views from various states.⁶² In most African jurisdictions parties can agree on whether and the extent of confidentiality obligations, either expressly in

54. For information on GAR (Global Arbitration Review), see <http://globalarbitrationreview.com/>.

55. For information on Law360 which is a LexisNexis company, see <https://www.law360.com/internationalarbitration>.

56. For example of blogs, see Kluwerarbitration, ALLA, and I-Arb.

57. For more information on I-Arb Africa which for now is a free service, see, <http://www.iarbafrica.com/>.

Leyou Tameru, founder of I-Arb Africa in Chapter 3 below engages more with the role of I-Arb in promoting arbitration in Africa.

58. See Filip de Ly, Mark Freidman and Luca Radicati di Brozolo, *International Law Association, International Commercial Arbitration Committee's Report and Recommendations on 'Confidentiality in International Commercial Arbitration'*, Arbitration International, Vol. 28 No. 3, 355–396 (2012).

59. See for example, Article 53 Kigali International Arbitration Centre (KIAC) Arbitration Rules 2012.

60. It is more difficult to police or enforce this obligation against non-core participants in the reference such as witnesses and administrative staff who have no personal interests at stake in the reference. The disputants' legal representatives will already be bound by their professional code of conduct in this regard.

61. Filip de Ly, Mark Freidman and Luca Radicati di Brozolo, *supra* n. 58, at 355–396.

62. See for some examples: *Esso Australia Resources Ltd v. Plowman* (1995) 128 ALR 391; *Ali Shipping v. Shipyard Trogir* [1998] 2 All ER 136; *Associated Electric & Gas Insurance Services Ltd v. European Reinsurance Company of Zurich* [2003] UKPC 11; *Department of Economic Policy and Development of the City of Moscow and The Government of Moscow v. Bankers Trust Company and International Industrial Bank* [2004] EWCA Civ 314.

their arbitration agreement, or through the applicable arbitration rules.⁶³ Generally, there are those jurisdictions where there is no imposed or implied obligation of confidentiality and those where there are such obligations.⁶⁴ The same applies under institutional arbitration rules.⁶⁵

Most of arbitration related laws in African States do not make any provisions on the confidentiality of arbitration as opposed to the private nature of the process.⁶⁶ There also appears to be a divide between common law inspired laws or the arbitration laws of common law jurisdictions and those that are civil law inspired. In most African common law jurisdictions, the issue of confidentiality is not expressly addressed in the laws. However, reliance is placed on the common law default presumption that arbitration is confidential.⁶⁷ The civil law jurisdictions however may include provisions on confidentiality in their laws.⁶⁸ This seeming divide has roots two legal traditions (common law and civil law) that predominate in African jurisdictions. It is settled that in African States, consensual arbitration is indeed private though the materials, information and documents disclosed during the reference and the awards may not necessarily be confidential.⁶⁹

[B] Litigation

Litigation on the other hand is also an adjudicative process but, of a public nature, sponsored by the State, and performed by the judicial arm of government. Thus, while the disputants drive the arbitral process, through the principle of party autonomy, the State drives the litigation process through constitutional principles. Most African States have written constitutions which articulate the different arms of government and the

63. Examples of such Rules are: Article 14 CCJA Arbitration Rules and Article 43 KIAC Arbitration Rules.

64. Examples are: Nigeria ACA; England under the Common Law (as the EAA 1996 does not contain any provisions on confidentiality). The Arbitration Law of France refers to the confidentiality of the deliberations of the arbitral tribunal in Article 1479 as does Article 18 OHADA UAA.

65. See for example, under Article 37(bis) CRCICA Rules, all materials, orders and other documents are confidential. Under the ICC procedure, ICC hearings are private while the ICC Court deliberations are confidential under Article 1 of the Internal Rules of the ICC Court. Under Article 30 of the LCIA Rules (same as LCIA/MIAC) awards and all materials are confidential except where disclosure is ordered by a court. Under Article 36 of the CIETAC Rules, the parties can have an open hearing but all documents including the award are confidential. See also UNCITRAL Notes on Organising Arbitral Proceedings, Clause 6 on confidentiality.

66. However, the latest version of the International Arbitration Law of South Africa (2017) includes section 11 on confidentiality of arbitral proceedings for those references held in private, while the default rule is for arbitral proceedings involving a public body to be held in public. On the private nature of the arbitral hearing, see Article 25(4) UNICTRAL Arbitration Rules (1976).

67. See for example, Michael Pryles, 'Confidentiality' in Lawrence W. Newman & Richard D. Hill (eds), *Leading Arbitrators Guide to International Arbitration* (2nd ed., Juris Publishing, 2008) 415-468.

68. See for example, Article 18 OHADA UAA.

69. The suggestion is not to presume that arbitration is confidential but to check the arbitration agreement and applicable arbitration rules for any contractual agreements on confidentiality, and to also check the arbitration law of the seat for any guidance on this issue.

scope of their powers.⁷⁰ All of these written constitutions make provisions on the courts and their hierarchy in the State; judicial officers; and the right of access of its citizens to these courts.⁷¹ Therefore the right of recourse to such courts and direct access of persons are constitutionally protected rights.

Historically, prior to the colonial era, there were diverse types of dispute resolution mechanisms deployed in various African communities. However, there were no centralised States in its modern construct⁷² in these communities so that the idea of a State sponsored and managed dispute resolution mechanism, such as litigation, was unknown in these communities.⁷³ Litigation therefore was a transplanted concept into these African communities by their predominantly European colonizers.⁷⁴ Litigation soon became more popular than the private and traditional processes of dispute resolution. This author has argued elsewhere that one primary reason for this shift was the availability of State backed sanctions in support of the decisions made by the State courts.⁷⁵ This effectively made litigation very popular as one mechanism that had some teeth. Over time, litigation became, (and remains) the predominantly used dispute resolution mechanism in various African countries.

There have been arguments on the unconstitutionality of some aspects of arbitration in some African jurisdictions.⁷⁶ One form of the argument is that recourse to arbitration amounts to the denial of justice because it denies the parties access to the courts and by extension access to the appeal procedures of the court process, as guaranteed under the various constitutions. The effect of this argument is that any process which denies parties the opportunity to appeal its decisions through the courts is unconstitutional since such appeals *access* is protected by the constitution.

70. Some examples are: the 1999 (as amended) Constitution of Nigeria; 1992 Constitution of Ghana; 1996 (as amended) Constitution of The Gambia; 1990 Constitution of Benin Republic; the 2010 Constitution of Kenya; and the 2012 Egyptian Constitution.

71. See for example, Part VII, 1999 Constitution (as amended) of Nigeria; Chapter 11, 1992 Constitution of Ghana; Chapter VIII, 1996 Constitution (as amended) of The Gambia; Title VI, 1990 Constitution of Benin Republic; Chapter 10 of the 2010 Constitution of Kenya; Part 3 Chapter 3 of the 2012 Constitution of Egypt.

72. The current territorial demarcations and formulation of States in Africa were non-existence prior to European colonisation. See as it relates to the Berlin Conference of 1884–1885, Henry Louis Gates Jr., and Kwame Anthony Appiah (eds), *Encyclopaedia of Africa* (Oxford University Press, 2010). On colonisation and Africa, see the two volume books by Ben Nwabueze, *Colonialism in Africa: Ancient and Modern* (Gold Press Limited, Ibadan, 2010) Volumes 1 and 2.

73. There were different kinds of dispute resolution processes adopted in these communities such as: mediation, conciliation, and customary arbitration.

74. The colonising powers of African States included Portugal, France, England, Belgium, and Germany. See Femi J. Kolapo and Kwabena O. Akurang-Parry (eds), *African Agency and European Colonialism: Latitudes of Negotiation and Containment* (Maryland: University Press of America, 2007) for a history of African colonisation from the perspective of the Africans directly affected by colonialism and colonial rule.

75. Emilia Onyema, 'Shifts in Dispute Resolution Processes of West African States' in Marian Robert, Maria Federica and Michael Palmer (eds), *Comparative Dispute Resolution Handbook* (Edgar Publishing, 2018). See also for example the history of the Kenyan courts available at <https://www.judiciary.go.ke/about-us/our-history/>.

76. For the constitutional challenges of arbitration in Kenya see Kariuki Muigua, *supra* n. 13, at 190–193. See *infra* Ahmed Bannaga in Chapter 8 on the same constitutional challenges of arbitration in Sudan; see also Paul Idornigie and Isaiah Bozimo, Chapter 10 on the constitutional challenges of arbitration in Nigeria.

This argument is founded on a faulty basis or misunderstanding of the essence of arbitration and how the process fits within the broader juridical space of any State. It is settled that recourse to arbitration is not an ouster of the jurisdiction of the courts. For example, the Nigerian Supreme Court in *Obembe v. Wemabod Estates Ltd* recognised this fact.⁷⁷ Some of the arbitration laws following the UNCITRAL Model Law provide that courts shall only intervene in any matter governed by the Act as provided by the Act.⁷⁸ Thus, in any of the situations permitted under such arbitration laws, parties can access the courts and its appeals structure as provided by the relevant constitution.

In addition, it is arguable that arbitration does not fall within the purview of any of the Constitutions since arbitration, as a private dispute resolution mechanism, is not mentioned as such in most of these Constitutions.⁷⁹ By extension this implies that the Constitutions do not apply to (non-statutory) arbitral tribunals which are not formal *courts* in the sense used under the Constitutions. Therefore, access to the appeals procedure of the courts provided in the Constitutions is only effective when applied to *court* decisions and will be resorted to when the dispute goes to court. For example, arbitral awards may be challenged on certain defined grounds before national courts (and not the arbitral tribunal). The application to challenge or enforce the award before the courts will trigger the appeals system provided in the Constitution. Thus, when the courts are engaged, the parties will have access to the appeals structure of the courts as provided for in the Constitutions. This argument is also supported, for example, by the intention of the drafters of the UNCITRAL Model Law which restricts court intervention in arbitration.⁸⁰ It should, however, be noted that the spirit of these provisions in the various Constitutions is to assure access to a dispute resolution mechanism for its citizens, and this is satisfied by the availability of arbitration and other ADR mechanisms which complement (and do not displace) the litigation process.

Finally, it must be noted that the rise of litigation as *the* dispute resolution process of choice in African States led to the creation of the legal industry to support its infrastructure. The legal industry is made up of various actors including the law departments in various African (and non-African) universities and law schools that produce the manpower needed to support it. These universities and law schools produce the lawyers who train to become attorneys with some joining the bench or judiciary as judges and magistrates, some acting as advocates, advisors, in-house counsel, law academics, court registrars, and prosecutors, among others. The other

77. (1977) 5 SC 70. See also: *City Engineering Nigerian Ltd v. Federal Housing Authority* (1997) 9 NWLR (Pt. 520) 224 (SC); *Owena Bank v. Vita Construction Ltd* (2006) 5 CLRN (CA); *SCOA Nigeria Plc v. Sterling Bank Plc*, Appeal No. CA/L/170/2013.

78. See for example, section 34 Nigeria ACA in similar wording to Article 5 Model Law (1985).

79. Justice Githinji recognised this point in the Kenyan case of, *EpcO Builders Ltd v. Adam S. Marjan Arbitrator & another*, Civil Appeal No. 248 of 2005 (unreported) but discussed in Kariuki Muigua, *supra* n. 13, at pp. 175–177.

80. See the drafting history of Articles 5 and 6 of the Model Law available at: <http://www.uncitral.org/pdf/english/travaux/arbitration/ml-arb/309meeting-e.pdf> where Sir Michael Mustill noted at the Working Group's 309th meeting, 'Everyone would agree that some measure of judicial intervention was inevitable in the field of arbitration and that the concept of a Model Law would be meaningless without courts to enforce its provisions.'

category of professionals that supports this legal industry includes the police officers, prison officers, civil processes sheriffs and administrators. All these personnel are trained to support the adjudicative process of litigation which is now well entrenched in African States. With such trained and available human resource at its disposal, the demise of litigation surely will not benefit the larger society and is not advocated. What needs to be found (which has been successfully implemented in other jurisdictions⁸¹) are ways in which the resources of the judicial system and other private dispute resolution processes can best be deployed towards the effective and efficient dispensation of justice in African States.

[C] Weaknesses of Litigation in African States

As a state sponsored dispute resolution mechanism, the state funds the judiciary and some of its support industry, such as the police and prisons. In most African States, there is no cost incentive for litigants to avoid the courts. To the contrary, the cost of access to litigation is an incentive to use the court system. Arbitration however is a more expensive mechanism for most disputants in Africa.⁸² This is because the disputants basically pay for the administration of the arbitral reference and the fees and expenses of the arbitrators, in addition to the costs of their legal representation. Thus, while in litigation, the litigants pay comparatively (to arbitration) small sums as court fees for the administration of their disputes and do not directly⁸³ pay the judges for their time and expertise; in arbitration they get no such assistance from the State. The trade-off can therefore be said to be that, for this additional expense, disputants have greater control over their dispute resolution process of arbitration. It can also be asserted that in exchange for paying for their own dispute resolution process, the State allows disputants to opt out of its bespoke dispute resolution process of litigation, into their own private process of arbitration. The cost associated with arbitration may justify its use primarily in (cross-border) commercial disputes.

In arbitration, the disputants choose their dispute resolvers and are more invested in the process and its management than in litigation.⁸⁴ In litigation the litigants do not get to choose the judge assigned to their dispute and may not exercise much control over the management of the litigation process.⁸⁵ This has implications of quality and expertise particularly for very complex and technical transactions. Chief Justice Allsop of the Australian Federal Court noted the need for commercial court

81. Jurisdictions such as Singapore and Hong Kong (SAR).

82. The issue of cost in arbitration was recognised in the Queen Mary University of London International Arbitration survey of 2006, 'International arbitration: Corporate attitudes and practices', as one of the disadvantages of international arbitration. The second being the length of time it took to resolve disputes.

83. Judges as public servants are paid from the taxes citizens pay the state or proceeds from the exploitation of their shared natural resources.

84. The power to choose the arbitrators is recognised as one of the major advantages of arbitration. See the 2006 Queen Mary survey mentioned above.

85. The cost factor of arbitration has implications for a fairer (or lack thereof) system of justice and its access. This is because access is limited to those disputants who can afford to pay for arbitral services.

judges to be well versed in commerce, be international in outlook and understand arbitration, as a minimal qualification they need to possess to determine arbitration matters.⁸⁶ In addition the perception of corruption in some of the judiciaries in Africa has also negatively impacted on the reputation of the litigation mechanism and the confidence of litigants in both the process and the decision-makers.⁸⁷

One advantage of arbitration over litigation which is gaining more traction is the speed with which the arbitral tribunal makes its decision in comparison with the delays from national courts. One example can be taken from the seminal *IPCO v. NNPC* Nigerian arbitration case.⁸⁸ The arbitration itself took eighteen months from its commencement to the publication of the award dated 28 October 2004 to the parties. Enforcement and various other proceedings before the English and Nigerian courts are still ongoing as at the time of going to press for the publication of this book. It is now thirteen years since the arbitral award was issued. This element of delay which pervades the judicial systems in most of African States is one of the primary attractions of (both domestic and international) arbitration over litigation.⁸⁹

The substantial number of disputes in the court systems may also indicate that African societies have become more litigious. One support for this view is the observation that litigants view litigation as a war to be fought all the way through the various levels of court available to them. The impact of this warring mentality is that litigants and their lawyers prepare to argue every point through the court appeals processes available to them.⁹⁰ Such appeals clog up the dockets of, not just the lower courts but also, the superior courts including the Courts of Appeals and the Supreme Courts. Delays have time and cost consequences so that the litigation process, in addition to inordinate delays, may also ultimately be prohibitively expensive for most African people. Such expense limits access to justice generally.

86. Paper delivered at the Centenary celebration of the Chartered Institute of Arbitrators in London on 2 July 2015. The text of the paper is available online at: [http://www.ciarb.org/docs/default-source/ciarbdocuments/london/the-hon-chief-justice-james-allso-ao-\(australia\).pdf?sfvrsn=0](http://www.ciarb.org/docs/default-source/ciarbdocuments/london/the-hon-chief-justice-james-allso-ao-(australia).pdf?sfvrsn=0).

87. On corruption in the judiciaries of some African States, see for example, in Nigeria, the National Bureau of Statistics in association with UNIDO 2017 edition of 'Corruption in Nigeria Bribery: Public Experience and Response', with the police and judiciary among the top public officials that demand bribes. The report is available at https://www.unodc.org/documents/data-and-analysis/Crime-statistics/Nigeria/Corruption_Nigeria_2017_07_31_web.pdf (accessed 21 August 2017). See also Ben Nwabueze, *The Judiciary as the Third Estate of the Realm*, (Ibadan: Gold Press Limited, 2007) 333–344, on the crisis of credibility and integrity in the (Nigerian) judiciary. Similar tales are told of the judiciaries in some other African countries such as Ghana and Kenya.

88. For a summary of the various *IPCO v. NNPC* cases as at April 2017, see Emilia Onyema, *The Continued Trial of the Nigerian Legal System in IPCO v. NNPC*, published by *This Day Newspapers* on 4 April 2017 available online at: <http://www.pressreader.com/nigeria/thisday/20170404/282458528806825>.

89. There may be a change in the horizon with the Kenyan Supreme Court decision to annul the Kenyan Presidential elections of 2017. The case was argued on 28 August 2017 and the decision of the Supreme Court was delivered orally on 1 September 2017. The speed of the delivery (and the decision itself) is unprecedented in Africa.

90. See Andrew Chukwuemerie, *supra* n. 9, at 152 where he noted that during the colonial period, 'even legal training administered to would-be lawyers emphasised adversarial fight-to-finish, or inquisitorial, litigation'.

These weaknesses of litigation and the judicial systems in Africa contribute to the increasing uptake of alternative dispute resolution processes by disputants. This includes arbitration primarily for commercial disputes. It must be acknowledged that for civil matters primarily in the domestic sphere, disputants increasingly refer their disputes to mediation instead of arbitration.⁹¹ This uptake in mediation is due to time and cost savings; and the willingness of some courts to enforce settlement agreements as consent judgments.⁹² A large number of disputes leave the vast majority of civil and all criminal disputes to be determined through the courts so that litigation, notwithstanding the increasing uptake of ADR processes, remains the predominant dispute resolution process in all African States.⁹³ However, the increase in the case load of African judiciaries has not been matched by a corresponding increase in the resources (human and infrastructure) allocated to the judiciaries. This state of affairs has led to backlogs and inordinate delays in the legal systems, which in turn have led to dispute flights to ADR processes for those litigants able to pay for the ADR processes.⁹⁴

§1.02 THE LEGAL NATURE OF ARBITRATION

Arbitration, as already mentioned, involves individuals (even as agents of legal entities) who may meet in some location within the territory of a given state for the resolution of their dispute. The ability of the parties to refer their dispute for resolution by arbitration will usually be permitted by a state while the state and its organs (laws and courts) may also be available to assist the process and to enforce the resultant award. These peculiarities of arbitration have led to the propagation of various theories to explain the interplay of these various actors and agencies with the state and its legal system.⁹⁵ For Professor Julian Lew, the attitude of national legal systems towards

91. See for example, the Multidoor Courthouse Scheme in Nigeria; on which see, Ajigboye Oyeniya, *The concept of Multi-door Courthouse in Nigeria: Rethinking Frank Sander's Concept* (16 November 2014) available at SSRN: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2525677; Emilia Onyema, *The Multi-door Court House (MDC) Scheme in Nigeria: A case study of the Lagos MDC*, *Apogee Journal of Business, Property & Constitutional Law*, Vol. 7, No. 2, 96–129 (2013).

92. Mediation usually takes a much shorter time to conclude (whether an agreement is reached or not) and is also much cheaper than arbitration which part explains the increase in usage. In jurisdictions where the courts enforce mediated settlement agreements there is an increase in the uptake of mediation. One example is under section 24 of the High Court Law of Lagos State (Nigeria) where the settlement from a court-annexed mediation is enforced as a consent judgment by the court.

93. This is because in the vast majority of African States crimes are not arbitrable.

94. See Emilia Onyema, *supra* n. 75, 'Shifts in Dispute Resolution Processes of West African States'.

95. See generally on juridical theories, Julian DM Lew, *The Applicable Law in International Commercial Arbitration* (Oceana, 1978); Samuel A, *Jurisdictional Problems in International Commercial Arbitration: A Study of Belgian, Dutch, English, French, Swedish, Swiss, US and West German Law* (Schulthess, 1989); Hong-Lin Yu, *Explore the Void: An Evaluation of Arbitration Theories, Part 1*, *Int'l ALR*, Vol. 7, No. 6, 180–190 (2004); and Hong-Lin Yu, *Explore the Void: An Evaluation of Arbitration Theories, Part 2*, *Int'l ALR*, Vol. 8, No. 1, 14–22 (2005); Emilia Onyema, *International Commercial Arbitration and the Arbitrator's Contract* (Routledge, 2010) 32–43. Ahmed Massoud, *The influence of the delocalisation and seat theories upon Judicial Attitudes towards International Commercial Arbitration*, *Arbitration*,

arbitration and its award depends on the legal nature of arbitration in such systems.⁹⁶ In the context of the relationship between arbitration and national courts; and judges and arbitrators, three major theories that take different approaches or views of these relationships are examined with particular reference to African States. These are the jurisdictional (which includes the seat and concession theories) (section A), autonomous and delocalised (section B), and the mixed or hybrid (section C) theories.⁹⁷

[A] The Jurisdictional Theories

These are the theories which highlight the dominance and control exercised by a state in the regulation of any arbitration proceeding connected to its territory.⁹⁸ Such control is usually exercised through its national laws and courts.⁹⁹ The connection of a state to an arbitration reference includes where the seat of arbitration or place of enforcement is located within the state; or the personal law applicable to the disputants is that of the state. The seat and concession theories are variations of the jurisdictional theory. The seat theory gives greater relevance to the supervisory role of the law and courts at the seat of arbitration,¹⁰⁰ while the concession theory focuses on the various concessions (in the form of laws) granted by the state to the disputants for the regulation of arbitration.¹⁰¹ Thus, these various strands of the jurisdictional theory highlight the supervisory or dominant power of the state over the autonomy of the disputing parties. This autonomy includes the right to enter into an arbitration agreement, the arbitrable subject matter, the arbitration proceedings, agreeing the powers exercisable by the arbitrator in the arbitral reference and the eventual arbitral award.¹⁰²

The fundamental premise of the jurisdictional theory (and its sub-sets) is that the arbitrator performs judicial functions as an alternative (though private) judge within the confines of a national law or international convention which the state has

Vol. 77, No. 4, 406–422 (2011); Jan Paulsson, *Arbitration in Three Dimensions*, ICLQ, Vol. 60, No. 2, 291–323 (2011); Emmanuel Gaillard, *Legal Theory of International Arbitration* (Martinus Nijhoff Publishers, 2010). Alec Stone Sweet & Florian Grisel, *The Evolution of International Arbitration: Judicialization, Governance, Legitimacy* (Oxford University Press, 2017).

96. See Lew, *supra* n. 95, at para. 63 quoting other commentators on the need to identify the legal nature of arbitration on which depend the attitude of national legal systems to arbitration proceedings and the award.

97. These theories may be described using other descriptors but the essence remains the same. For example, in Jan Paulsson's, 'Arbitration in Three Dimensions', he discussed, territorial, pluralistic, and autonomous theses of arbitration.

98. The jurisdictional, seat and concession theories fall into this group. See Lew, *supra* n. 95, for a list of the proponents of the traditional jurisdictional theory.

99. *Ibid.*, at para. 65.

100. Ahmed Massoud, *supra* n. 95, examined decisions from various jurisdictions and tested these against the theories to conclude that generally decisions from common law jurisdictions tend towards the seat theory while those from civil law jurisdictions tend towards the delocalisation theory.

101. Hong-Lin Yu and Eric Sauzier, *From Arbitrator's Immunity to the Fifth Theory of International Commercial Arbitration*, Int ALR, Vol. 3, No. 4, 114 (2000), where they argued that arbitration starts from a contractual basis before regulation by states through laws which effectively were the 'permission' granted by the state in recognition of arbitration since the state acts to support the process of arbitration.

102. Lew, *supra* n. 95, at paras 66–68; and see also Yu, *supra* n. 95, at 180.

implemented. It thus emphasises that arbitration references cannot take place in a territorial vacuum but are subject to one or more identified national laws.¹⁰³ For seat theorists, this national law is the law of the seat of arbitration chosen (directly or indirectly) by the parties.¹⁰⁴

Dr Mann argued strenuously on the pre-eminence of the state and its laws in the regulation of arbitration and completely rejected the arguments on the autonomy or delocalisation of international arbitration from the law of the seat of arbitration. For Dr Mann:

Whatever the intentions of the parties may be, the legislative and judicial authorities of the seat control the tribunal's existence, composition and activities ... The local sovereign does not yield to them except as a result of freedoms granted by himself.¹⁰⁵

Some aspects of Dr Mann's observation remain valid since parties opting to resolve their disputes by arbitration must have legal capacity to conclude an arbitration agreement and their underlying transaction must be arbitrable as defined by some relevant national law or sovereign. The point of departure from Mann's position, for some commentators such as Emmanuel Gaillard is that this law must not necessarily be the law of the seat of the arbitration.¹⁰⁶ It may be the personal laws of the disputants or the law of the place of enforcement.¹⁰⁷ It must also be noted that arbitration can validly commence under authority conferred, not necessarily under a national law, but under an international convention, multilateral or bilateral treaty, albeit ratified and implemented by the relevant state as argued by the concessionists.¹⁰⁸

Modern legal regimes for international arbitration are supportive of the process unlike the position for example, during the operation of the Geneva Protocol of 1923 and Geneva Convention of 1927, when the concept of double exequatur of arbitral awards held sway.¹⁰⁹ This situation gave greater prominence to the law of the seat of

103. This is the antithesis of the delocalization theory.

104. The seat of arbitration may be chosen by arbitration institutions, the arbitral tribunal and not even by the disputing parties.

105. See Francis A. Mann, *Lex Facit Arbitrium*, *Arbitration International*, Vol. 2 (3), 246 (1986) and such freedoms are described as concessions by the concessionists.

106. Emmanuel Gaillard, *supra* n. 95. For a critique of Mann's position, see Jan Paulsson, *supra* n. 95, at 4-7.

107. On arbitrability see for example, Article II(1) and Article V(2)(a) of the New York Convention.

108. Yu and Sauzier, *supra* n. 95, at 120. Some examples are Article 25 ICSID Convention, Chapter 11 NAFTA, Article 26 Energy Charter Treaty; see also various BITs available at: <http://icsid.worldbank.org/ICSID/FrontServlet>. This is especially true since each State would have to ratify an international convention for it to be binding on it. In some States, for example in common law jurisdictions, such instruments will have to be enacted into national law to become enforceable, while in other jurisdictions upon ratification, the convention becomes directly applicable (the monist and dualist concepts).

109. Under the 1923 Geneva Protocol on Arbitration Clauses and the 1927 Geneva Convention on the Execution of Foreign Arbitral Awards regimes, an award had to be declared final and binding by the courts at the place of arbitration before being recognised and enforced by the courts at the place of enforcement. This required obtaining prior recognition before the courts at the place of arbitration and subsequently again before the courts at any place of enforcement.

arbitration even during the challenge and enforcement of awards.¹¹⁰ The implementation of the New York Convention makes this argument moot as it relates to the double exequatur of arbitral awards.¹¹¹ The arbitration laws of the vast majority of African States recognise the final and binding nature of arbitral awards and do not include the double exequatur requirement for its enforcement.¹¹² In addition, as already mentioned, the New York Convention also applies in thirty-six African States.

The arguments in favour of the supremacy of the law of the seat on the basis of Article V 1 (e) of the New York Convention are further eroded by the growing number of New York Convention or final awards which, though set aside or annulled at the seat of arbitration, are enforced in other jurisdictions. Most of these examples are from non-African jurisdictions.¹¹³ In *Hilmarton*¹¹⁴ the French Cour de Cassation enforced an award that had been set-aside at the seat of arbitration on the basis of its own law which it applied by virtue of Article VII of the New York Convention.¹¹⁵ This has been followed in other jurisdictions.¹¹⁶ In recent months, the United States courts enforced the *Pemex* award which had been annulled in Mexico¹¹⁷ but refused to intervene in the *Getma* annulment which it upheld.¹¹⁸ The English High Court on its part recently refused to enforce an award that had been annulled by the seat courts of Russia;¹¹⁹ and finally the Amsterdam Court of Appeal in the *Yukos* decision enforced an award that

110. The double exequatur regime led Niboyet to argue that the arbitral award is a draft judgment which only becomes a final judgment when recognised by the courts at the seat of the arbitration. See, Lew, *supra* n. 95, at para. 67.

111. This is particularly apt because as at the end of December 2017, 157 states are parties to the New York Convention. In March 2018 this number increased to 159. See on the status of the Convention: http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html.

112. See for example, Article 35 Model Law; Article 30 OHADA UAA; section 57 Ghana ADRA.

113. In Tanzania, *National Roads Agency v. Kundan Singh Construction Ltd* [2014] eKLR, Civil Appl No. 171 of 2012, the Kenya Court of Appeals sitting in Mombasa was requested to enforce an award which was also challenged before the Stockholm Court of Appeal. The CA decided it lacked jurisdiction to entertain the appeal on the basis that sections 36 and 37 of the Kenyan Arbitration Act vested powers on the High Court to determine award challenges without any further right of appeal.

114. *Hilmarton v. Omnium de Traitement et de Valorisation (OTV)*, YBCA, 1995, vol XX, p. 663. See also, *Pabalk Ticaret Sirketi v. Norsolor S.A.*, Cass. Civ. Ire, 9 October 1984, Rev. Arb. (1985) 421; (1986) XI Yearbook Commercial Arbitration, 484.

115. Article VII of the New York Convention in relevant part provides: ‘The provisions of the present Convention shall not ... deprive any interested party of any right he may have to avail himself of an arbitral award in the manner and to the extent allowed by the law or the treaties of the country where such award is sought to be relied upon.’

116. See for example, The United States court annulment decision in *Chromalloy Aeroservices Inc. (USA) v. The Arab Republic of Egypt*, 939 F. Supp. 907, YBCA, 1997, Vol. XXII, p. 1001. This decision was not however followed in *Baker Marine (Nigeria) Ltd v. Chevron (Nigeria) Ltd*, 191 F 3d 194 (CA 2nd Cir. 1999).

117. *Corporación Mexicana de Mantenimiento Integral, S De RL De CV v. Pemex-Exploración y Producción*, No. 13-4022 (2d Cir. 2 Aug. 2016).

118. *Getma International v. Republic of Guinea*, No. 16-7087, decision of the US Court of Appeals, District of Columbia dated 7 July 2017.

119. *Nikolay Viktorovich Maximov v. Open Joint Stock Company ‘Novolipetsky Metallurgichesky Kombinat’* [2017] EWHC 1911 (Commission) where the High Court held that for it to enforce an annulled award, it would have to be able to infer that the Russian courts were biased against the claimant or the decision would have been so extreme and incorrect that no court acting in good faith could have arrived at it other than by bias.

had been set aside by the seat court.¹²⁰ There clearly is no uniform State practice on this question which has prompted the call to UNCITRAL to examine this issue and make some recommendations to enhance the uniform interpretation and application of the New York Convention.¹²¹ It will be interesting to see how any court in Africa will view this issue when the opportunity arises. It is hoped that such African court will take a robust view of the provisions of the New York Convention and its international character. That such court will defer to the decision of the court at the seat of arbitration except for reasons that offend its public policy principles.

The wider confines of the jurisdictional theory are recognised as valid and remains so in the sense that a sovereign will need to endow disputants with the legal authority to consent to arbitration over a subject matter that the sovereign considers arbitrable. The states that determine these matters may not necessarily be the same. Different states may confer each of these rights and limitations, depending on its connection to the particular arbitration and the disputants.¹²² In addition, as the delocalists remind us, it is possible for disputants to arbitrate under their own bespoke rules or under the arbitration rules of an institution without recourse to the law or courts of the seat of arbitration (or any other state) and for the final award or decision of the tribunal to be voluntarily performed.¹²³

The dearth of data on the number of arbitration references fuels reliance on anecdotal evidence that most arbitral awards are performed and so never enter into the public domain.¹²⁴ Having said that, the 2008 International Arbitration Survey by Queen Mary University of London found that 25% of cases settled before an arbitral award was rendered while in 49% of cases, the final award was voluntarily complied with leading to the conclusion of the Survey that ‘overall, 92% of the arbitration disputes are successfully resolved at some stage through the arbitration proceedings’.¹²⁵ It must therefore be conceded that the state plays a role in arbitration but it is debatable if such role is as overwhelming as posited under the jurisdictional theories.

120. *Yukos Capital SARL (Luxemburg) v. OAO Rosneft (Russian Federation)*, Decision of the Amsterdam Court of Appeal of 28 April 2009, (XXXIV Yearbook Commercial Arbitration, 2009) 703–714.

121. See paper delivered at the 50th anniversary Congress of UNCITRAL at its Secretariat in Vienna by Vesna Lazic, *The Yukos and Pemex Judgements: Do the Courts in The Netherlands and in the United States Follow the same Approach when Enforcing Annulled Arbitral Awards?* (UNCITRAL, 2017). The paper is available on the UNCITRAL website.

122. This appears at first glance to fit within Jan Paulsson’s ‘three dimensional conception’ of arbitration, but not quite, as Paulsson’s concept includes non-state actors. See Jan Paulsson, *supra* n. 95, at 32.

123. For example, Jan Paulsson, *Arbitration Unbound: Award Detached from the Law of its Country of Origin*, ICLQ, Vol. 30, 358 (1981).

124. The anecdotal evidence from arbitration practitioners in Africa is that the vast majority of arbitral awards are voluntarily performed. It is hoped that with the new transparency initiatives which put in the public domain information on arbitral references, it will soon be possible to support this anecdote with robust scientific evidence.

125. The 2008 Queen Mary International Arbitration Survey, ‘Corporate Attitudes and Practices’, 7–12.

[B] The Autonomous and Delocalisation Theories

The contractual theory is the fore runner of the autonomous theory. This group of theories argue that party autonomy is the essence and core foundation of arbitration.¹²⁶ The contractualists argued that arbitration is contractual in nature so that the law of the seat of arbitration has no relevance to the arbitral reference. They support this argument by noting that arbitration originates, commences, is conducted and terminates in accordance with the provisions of the arbitration agreement between the disputing parties.¹²⁷ This theory, however, recognises that arbitration can and is influenced by national law,¹²⁸ but rejects any suggestion that the state exercises a controlling power over arbitration as argued under the jurisdictional theories.¹²⁹

It is recognised that all consensual arbitrations are rooted in contract evidenced in the arbitration agreement. However, it is obvious that states do more than just *influence* arbitration references connected to them, even though as already stated, the involvement of states in arbitration is not as dominant as is argued under the jurisdictional theories. In effect the regulation of arbitration by states can be mapped on a sliding scale of these two extremes. For example, there are African jurisdictions that the national laws and courts will only intervene in very limited circumstances in international arbitrations connected to them;¹³⁰ while for the majority of African States their laws create more opportunities for their courts to intervene in arbitration, and court practices vary.¹³¹

The weaknesses of the contractual theory are obvious, and this has led to its decline¹³² and evolution into the autonomous and delocalised theories. This group of theories are founded on the proposition that the autonomy of the parties is supreme and has an overriding influence in arbitration.¹³³ These theories developed following

126. Lew, *Applicable Law*, gives a list of proponents (which includes Merlin and Foelix) of the contractual theory in footnote 69.1. See also Yu, *supra* n. 95, at 185–190.

127. Lew, *supra* n. 95, at para. 69, quoting Klein.

128. This is through the application of mandatory rules of the law of the seat of arbitration to which parties are nonetheless bound and cannot exercise any discretion.

129. Thus, the extent of state influence marks the line of departure between the jurisdictional and contractual theories. For the jurisdictional theorist, the state controls arbitration by its sovereignty while for the contractual theorist the parties control arbitration by the doctrine of party autonomy.

130. Examples in Africa are Mauritius and Rwanda with the adoption of the 2006 version of the UNCITRAL Model law. The judiciaries of both countries also implement a conscious non-interference policy. See the Nigerian case of *Shell Petroleum Development Co of Nigeria v. Crestar Integrated Natural Resources Ltd*, Appeal No CA/L/331M/2015 on interim measures and interpretation of section 34 ACA by the Nigerian Court of Appeal (also discussed in Chapter 10 below).

131. For comparison with other developing jurisdictions, see for example, Sameer Sattar, *National Courts and International Arbitration: A double-edged Sword?* *Journal of International Arbitration*, Vol. 27, No. 1, 51–73 (2010), on the attitudes of the courts in India, Pakistan and Bangladesh towards international arbitration.

132. For a critique of the contractual theory, see, Emilia Onyema (2010), *supra* n. 95, at 36–38.

133. For example, the European Court of Justice in support of the autonomous theory held in *Nordsee Deutsche Hochseefischerei GmbH. Bremerhaven, F.R. Germany v. Reederei Mond Hochseefischerei Nordstern AG & Co., KG. Bremerhaven, F.R. Germany, and Reederei Friedrich Busse Hochseefischerei Nordstern AG & Co. KG. Bremerhaven, F.R. Germany*, YBCA, 1983,

the growth in recourse to institutional arbitration so that these institutions began to play a more important role in arbitration.¹³⁴ Julian Lew argues that the juridical character of arbitration is determinable by an examination of its use and purpose, so that arbitration is neither classified as jurisdictional or contractual or even mixed, leaving it as an autonomous milieu.¹³⁵

This argument makes the relevance of the provisions of the *lex loci arbitri* (law of the seat of arbitration) practically redundant, especially since parties can choose to subject their dispute to the procedural rules of an independent, a-national regime.¹³⁶ An example is under institutional arbitration where the rules of such institutions are not connected to any national law, but are independent, even of the laws of the place where the institution is located.¹³⁷

However for Hu, as persuasive as this analysis may be, he insists it must be recognised that such rules are essentially private rules which will still be subject to the mandatory provisions of the law of the seat of arbitration.¹³⁸ Moreover where such institutional rules make no provision or have a gap, the law of the seat will still act as a gap-filler, except the arbitral tribunal or disputants agree new rules.¹³⁹ On this situation, Gaillard argues that the law of the seat may not be implicated at all in a particular arbitral reference but the law of the place of enforcement may be invoked at one of the most critical stages of the reference: the award enforcement proceedings. In his view, this makes the law of the place of enforcement a more important law to consider instead of the law of the seat.¹⁴⁰

For delocalisation theorists, the basic idea is that the international arbitration reference is completely removed from any national legal system as a procedure located in the international or transnational legal order. In this author's view, the delocalisation theory is a variant of the autonomous theory. According to Jan Paulsson, international arbitration does not need to be attached or connected to any legal order on the basis of its international nature.¹⁴¹ In this way, it enjoys a transnational existence.¹⁴² The fact that most arbitrations are now held under the auspices of an

Vol. VIII, 183, that international arbitration depends solely on the parties' intentions and not on the procedural rules of the law of the seat of arbitration.

134. Yu, *supra* n. 95, at 17. The autonomous theory posits that commercial parties as the primary users of arbitration lead the development of its practice, procedure and law while states and arbitration institutions modify their laws and rules accordingly. This claim is supported by the intermittent reviews of arbitration laws and arbitration rules to reflect the expectations of their users and for them to remain fit for the purposes of such users.

135. Lew, *supra* n. 95, at paras 78–79.

136. *Ibid.*, at para. 80.

137. In more recent times, major international arbitration institutions such as the LCIA, ICC, ICSID, PCA, have opened offices (or branches) in several locations or states outside of their primary domicile. In Africa, Mauritius hosts a PCA office and partners with LCIA as it relates to LCIA-MIAC.

138. See Yu, *supra* n. 95, at p. 19, and for further criticisms of this theory.

139. This refers to non-mandatory provisions in national arbitration laws.

140. See Gaillard, *supra* n. 95, at p. 32.

141. On the delocalisation theory see, Jan Paulsson, *supra* n. 123, at 358; and J. Paulsson, *Delocalization of International Commercial Arbitration, When and Why it Matters*, ICLQ, Vol 32, 53 (1983).

142. See also Lew, *supra* n. 95, at para. 81.

arbitration institution which administers the reference through its rules;¹⁴³ and most of such references do not make recourse to the law or the courts at the seat;¹⁴⁴ and most awards are voluntarily performed;¹⁴⁵ means that such arbitrations and the awards float, having no connection to any state.¹⁴⁶ The supporters of this theory are of the view that it is when the (laws and) courts of a state are engaged that the arbitration crystallises and then attaches to that particular jurisdiction. Such jurisdiction may not necessarily be the seat of the arbitration while most likely it will be the place of enforcement or challenge of the award. The French Cour de Cassation in *PT Putrabali Adyamulia (Indonesia) v. Rena Holding (France)*¹⁴⁷ in support of the delocalisation theory noted that:

An international arbitral award, *which does not belong to any state legal system*, is an international decision of justice and its validity must be examined according to the applicable rules of the country where its recognition and enforcement are sought. (Emphasis added).

However, we must recognise that arbitration, whether international or domestic, cannot be fully delocalised so long as it is held within a locale or a state.¹⁴⁸ This context in which arbitration operates reveals the involvement to various degrees of states (their laws and courts) connected to any arbitral reference. Such involvement of states is not based on a contract between the disputing parties or any other participants in the process but as a sovereign or regulator within whose territory, or under whose law or protection, the parties or dispute or substantive transaction falls. As noted by critics of this theory, it fails to take account of the fact that just because the state and its machinery are not engaged during the arbitral proceeding, this does not mean the arbitration lacks any *connection* with the State (which will most likely be the seat of arbitration).¹⁴⁹ At the very least, the arbitration reference is seated within the confines of a particular state. The laws and courts of such state are there to be engaged if the parties need to, while they must comply with its mandatory provisions or requirements. Surely the requirement of mandatory law automatically connects an arbitral reference to a particular state once a seat is chosen. There is hardly any African jurisdiction where arbitration assumes a completely autonomous existence from its

143. In the 2006 Queen Mary International Arbitration Survey, 76% of their respondents said they opt for institutional arbitration against 24% that opt for ad hoc arbitration. See 'International Arbitration: Corporate Attitudes and Practices', 2006 at p. 12.

144. The 2010 Queen Mary International Arbitration Survey, 'Choices in International Arbitration' found that parties take the 'formal legal infrastructure' of states into consideration in choosing a seat, at pp. 17–20.

145. This fact was confirmed in the 2008 Queen Mary International Arbitration survey at 10–12.

146. See Jan Paulsson, *supra* n. 141, at 53.

147. First Section, No. 05-18053 of 29 June 2007; Rev. Arb. 2007, 507.

148. This includes online arbitrations, which may be conducted partially or fully virtually, with participation through computers and over the internet. Such computers are themselves located within a state.

149. Goode Roy, *The Role of the Lex Loci Arbitri in International Commercial Arbitration*, Arbitration International, Vol. 17, 19 (2001); and Yu, *supra* n. 95, at 14.

legal system.¹⁵⁰ As already mentioned, the law of the seat of arbitration and the place of enforcement remain of relevance in international arbitration references.¹⁵¹ In recognition of the indispensable role of national courts in arbitration, Kariuki Muigua argues that the question is not whether courts have a vital role (because they do) but the extent a court should be allowed to intervene in arbitral proceedings.¹⁵²

[C] Mixed or Hybrid Theory

The proponents of the mixed or hybrid theory attempt to reconcile the jurisdictional and contractual theories. They argue that arbitration contains elements of both public (jurisdictional) and private (contract) law.¹⁵³ In contrast to the delocalists, the hybrid theorists argue that international arbitration cannot be completely detached from all legal systems.¹⁵⁴ Professor Sauser-Hall argued that arbitration must be subject to some national law that determines the validity of the submission of the dispute to arbitration and the enforceability of the resultant award.¹⁵⁵ This will at the very least ensure the minimal compliance with due process of the arbitration procedure.

The hybrid theory acknowledges that arbitration is rooted in the arbitration agreement (contract) but must satisfy certain statutory requirements under public law (jurisdiction) for validity purposes.¹⁵⁶ Redfern and Hunter in its third and fourth editions stated expressly, in favour of this theory, that:

International commercial arbitration is a hybrid. It begins as a private agreement between the parties. It continues by way of private proceedings, in which the wishes of the parties are of great importance. Yet it ends with an award that has binding legal force and effect and which, on appropriate conditions, the courts of most countries of the world will recognize and enforce. The private process has a public effect, implemented with the support of the public authorities of each state and expressed through its national laws.¹⁵⁷

However, in its fifth edition, the expanded editorial team did not take any express view following their discussion of the delocalisation and seat theories from which it appears there is a shift towards support for the seat theory.¹⁵⁸ However, this quote from

150. See however, Article 1514 Arbitration Law France, under which the enforcement of international arbitration awards enjoy an autonomous existence subject only to international public policy. But the French courts and law are still relevant in assisting and supporting parties and arbitrators in the arbitral process.

151. Article V New York Convention and Article 36 Model Law.

152. Kariuki Muigua, *supra* n. 13, at 167.

153. According to Lew, *supra* n. 95, at para. 75, the mixed theory was developed by Professor Sauser-Hall in his Report to the Institut de Droit International.

154. Yu and Sauzier, *supra* n. 101, at 119; and Lew, *supra* n. 95, at para. 74.

155. This may not necessarily be the seat of arbitration.

156. Lew, *supra* n. 95, at paras 76–77 quoting Jean Robert and Sauser-Hall in footnotes 76.2 and 76.3, respectively.

157. Alan Redfern and Martin Hunter, *The Law and Practice of International Commercial Arbitration* (3rd ed., London: Sweet & Maxwell, 1999) paras 1–16 and (4th ed., 2009) paras 1–16.

158. Nigel Blackaby, Constantine Partasides, Alan Redfern and Martin Hunter, *Redfern and Hunter on International Arbitration* (5th ed., OUP, 2009) paras 3.71–3.87. The authors again did not make their preferred view known in the 6th edition, OUP (2015).

Redfern and Hunter clearly points to the wider remit of the jurisdictional theory and is not limited to the seat of arbitration. The mixed theory therefore recognises and resolves the shortcomings of the propositions of the contractual theory and the excesses of the jurisdictional and delocalisation theories. According to Gary Born:

[I]t is impossible not to consider arbitration as a hybrid, combining elements of both contractual relations and jurisdictional authority ... At the same time, arbitration is also *sui generis* and autonomous, exhibiting characteristics that are not shared by either contract or judicial decision-making.¹⁵⁹

The various juridical theories recognise the importance of the arbitration agreement in any consensual arbitration. Their views differ on the extent of the control (if any) of the state in regulating arbitral references connected to it. It is possible to conceive of a sliding scale against which the regulation of arbitration by states can effectively be measured. The scale will have the jurisdictional and autonomous theories on either end and the mixed or hybrid theory in the middle of the scale. There does not appear to be any African States at either of the two ends of the scale. As it relates to African States, the vast majority, empower their citizens to conclude arbitration agreements primarily over private and commercial matters. In some states, there are express prohibitions of certain subject matters that may not be privately arbitrated. Such matters include tax, labour disputes, environmental matters and certain economic interests. It must however be noted that progressively, many more subject matters are becoming arbitrable. This may be evidence of the impact of the convergence of laws, standards set by documents such as the UNCITRAL Model Law, international legal practice and the transference of norms of practice as a result of globalisation.

The vast majority of African countries, from their laws and court judgments can be described as leaning more towards the jurisdictional theory. This is understandable especially in the context of the strong and pro-sovereignty stance of African States. This, in itself, is not a negative attribute or conclusion because a state can, through its laws and courts, provide assurances of its support for arbitration.¹⁶⁰ Some African States have clearly taken policy initiatives and actions to evidence this support. Acknowledged examples are Mauritius, Rwanda and under the OHADA regime.¹⁶¹ Some African States have laws that on paper are supportive of arbitration while some of the interpretations emanating from their courts may be construed as negatively interventionists or at best confusing signals.¹⁶² Finally there are those African States

159. Gary Born, *International Commercial Arbitration, Volume 1* (Wolters Kluwer, 2009) 188.

160. One internationally recognised example is England and Wales.

161. See Duncan Bagshaw, 'The Experience of LCIA-MIAC', in Emilia Onyema, *infra* n. 182, at 95–108; Didas M. Kayihura, 'Rwanda' in Lise Bosman, *infra* n. 182, at 223–229; Mahutodji Jimmy Vital Kodo and Narcisse Aka, 'The CCJA as a Regional Arbitration Institution' in Emilia Onyema, *infra* n. 182, at 47–60.

162. One example is Nigeria which even prevents non-Nigerian qualified legal practitioners from representing parties in arbitrations with seat in Nigeria. See for more detailed discussion, Paul Idornigie and Isaiah Bozimo in Chapter 10 below.

whose laws and courts can be described as out rightly unsupportive of arbitration.¹⁶³ In this author's view, African States must aim in their laws to recognise the private nature of arbitration and at the same time, ensure support for the process through their laws and courts. Support in this case does not mean a carte blanche to everything arbitration but for the courts to show some degree of informed deference to the decisions of arbitral tribunals while safeguarding their most fundamental public policy principles. To achieve this balance, African States at this stage of their development should aim to implement the hybrid or mixed theory which can be said to sit halfway through the juridical scale of arbitration theories.

§1.03 ROLE OF JUDGES AND ARBITRATORS IN ARBITRATION

Judges and arbitrators decide disputes in the adjudicatory processes of litigation and arbitration respectively. They both exercise judicial powers though the sources of their powers differ. Judges obtain their power to act from the State (or people) usually articulated in a Constitution, which is a public source. Arbitrators however, obtain their powers from the arbitration agreement between the disputants, which is a private source. This section briefly examines how judges and arbitrators may interact in an arbitral reference (section A); and discusses the impact of these different sources of power on the relationship between judges and the arbitral reference (section B).

[A] Arbitrators and Judges in Arbitration

An arbitrator is the individual who decides the issues in dispute between the disputants.¹⁶⁴ Therefore of necessity, the arbitrator must be a physical person.¹⁶⁵ Where an office is named as arbitrator, then the reference will be to the individual occupying the office at the time the dispute eventuates.¹⁶⁶ It is usual to appoint more than one arbitrator to decide a dispute, though in sets of uneven numbers to ensure a majority

163. One example already mentioned is Sudan as further examined by Ahmed Bannaga in Chapter 8 below.

164. On the status of the arbitrator, see generally Michael J. Mustill and Stewart C. Boyd, *The Law and Practice of Commercial Arbitration in England* (2nd ed., Butterworths, 1989) and its Companion Volume (2001); Klaus Lionnet, *The Arbitrator's Contract*, Arbitration International, Vol. 15, 161–169 (1999); The various contributors in the special supplement of the ICC International Court of Arbitration Bulletin, December 1995 on 'The Status of the Arbitrator'; Emilia Onyema, (2010), *ibid.*, at 43–59; David St John Sutton, Judith Gill and Matthew Gearing, *Russell on Arbitration* (23rd ed., Sweet & Maxwell 2007); Sigvard Jarvin, *The Sources and Limits of the Arbitrator's Powers*, Arbitration International, Vol. 2, 140–151 (1986).

165. Some arbitration laws such as, Article 11 Model law imply the arbitrator must be a physical person. However, Article 6 OHADA UAA and section 12 Ghana ADR Act both expressly state that only a natural person can act as arbitrator. Article 1451 Arbitration Law France provides that where a legal person is appointed arbitrator, its 'powers are limited to organising the arbitration'.

166. See for example, Article 6 UNCITRAL Arbitration Rules which refers to the Secretary General of the Permanent Court of Arbitration (PCA) as the default appointing authority. The same appointing authority is referred to under section 54 Nigeria ACA (for international arbitration references).

decision can be reached.¹⁶⁷ It is the panel of one or more arbitrators that constitute the arbitral tribunal. This author has argued that the arbitrator concludes a contract with the parties or institution when they accept the offer of the parties or institution to act or sit as arbitrator.¹⁶⁸ In this way the arbitrator agrees their terms of appointment with the parties or institution against which they can make claims in contract.¹⁶⁹ There is another view that the arbitrator (in similar terms with the national judge) enters into their office granted by the state in its (arbitration) law. This is known as the status theory articulated by Mustill and Boyd.¹⁷⁰

A national court judge on the other hand, is part of the judiciary of the state. She is a public officer of the court and the state and swears allegiance to the state (unlike the arbitrator). The judge therefore, unlike the arbitrator, is an employee of the state and subject to all the rights and obligations of such employees attached to her office. It is practically now settled in the literature that the source of the arbitrator's powers is contractual and not statutory as the powers of the national court judge. It is also fully acknowledged that the judge enjoys her status as a result of her office as a judge.

The moments when a national court may become involved in arbitration references are not contentious.¹⁷¹ This interaction reveals that there are certain periods of the arbitral reference that national courts have little or no engagement. This is from the moment the arbitral tribunal is constituted until it publishes its final award. Prior to the constitution of the arbitral tribunal, disputants may have recourse to national courts.¹⁷² At this stage, national courts may assist for example, with the appointment of arbitrators,¹⁷³ granting anti-suit injunctions¹⁷⁴ and interim measures of protection.¹⁷⁵ After publication of the final award when the arbitral tribunal becomes *functus officio*,

167. See for example, Article 10 Model Law, Article 8 OHADA UAA; section 13 Ghana ADRA; Article 7 UNCITRAL Rules, Article 7 CRCICA Rules, Article 12 KIAC Rules, Article 5.1 LCIA/MIAC Rules; Article 3.1 OHADA CCJA Rules.

168. See Emilia Onyema (2010) 84–102.

169. *Ibid.*, at 122–166.

170. Mustill and Boyd, *Commercial Arbitration*, pp. 219–223. For a detailed critique of the status theory see, Klaus Lionnet (1999) *infra* n. 164, at 163.

171. For a discussion on this interaction see for example, Emilia Onyema, *Power Shift in International Arbitration Proceedings*, Caribbean Law Review, Vol. 14, Nos 1 and 2, 62–77 (2004).

172. At this stage, it basically depends on the form of arbitration (whether ad hoc or institutional) and the remedy or claim sought by the parties. The Arbitration Rules of most institutions give the institutions the power to assist the parties (by making administrative decisions) before the composition of the arbitral tribunal.

173. See Article 11(4)(c) Model Law; Article 5 OHADA UAA; the Ghana ADRA does not envisage appointment of arbitrators by the courts but parties can agree this under section 14(5).

174. See Article II.3 New York Convention; Article 13 OHADA UAA; section 6 Ghana ADRA.

175. See Article 17J Model Law; Article 13 para. 4 OHADA UAA; section 39 Ghana ADRA. If a party seeks interim measures of protection for example, and the reference is under institutional rules which provide for a form of emergency arbitrator reference, a party may need to first seek that measure from the emergency arbitrator as, for example, held by the English Commercial Court in, *Gerald Metals SA v. Trustees of the Timis Trust & Others* [2016] EWHC 2327. However, where there is no provision for an emergency arbitrator (or pre-arbitral referee) the national court may take jurisdiction and assist the party. The Nigerian Court of Appeal, in *Shell Petroleum Development Co of Nigeria v. Crestar Integrated Natural Resources Ltd*, Appeal No. CA/L/331M/2015, refused to grant an interim application in support of an international arbitration not domiciled in Nigeria because it lacked jurisdiction, not being the seat court.

recourse can also be made to national courts for the enforcement or setting aside or annulment of the final award.¹⁷⁶

This brief discussion suggests that generally under arbitration laws, there is a well-ordered demarcation of powers between arbitral tribunals and national courts. However, the key question is whether this seemingly obvious demarcation is respected by both sides. It appears that in some African jurisdictions, national courts are more negatively interventionist with some judges (particularly at the first instance level) seeking to usurp the powers given to the arbitrator by their national law and the disputants over the dispute.¹⁷⁷ Such usurpation is usually interpreted as evidence of lack of support for arbitration.

[B] Impact of Source of Power on the Arbitral Reference

As already mentioned, the source of the powers of the judge is the state or more accurately the Constitution of the state while the source of the arbitrator's power is the arbitration agreement between the disputants. The question that this different power sources raises is what (if any) is the impact of these power sources on the operation of the arbitration? In this author's view, the most significant impact of this different power sources on the arbitral reference is the availability of the police powers of the state to the judge and not to the arbitrator. For example, the judge can bind non-parties to the arbitration, and enforce the orders and decisions of the arbitral tribunal. The arbitral tribunal cannot exercise these powers; and even where the arbitrator is granted such powers,¹⁷⁸ they lack powers to enforce their decisions. This is unlike the judge who can enforce the orders or decisions they make. Therefore, arbitration relies on national courts to enforce its decisions.

Going back to the demarcation of powers point, the arbitrator (and not the judge) has the power to determine the substantive dispute between the parties. However, the judge can enforce (through the mechanism of the state) its judgment and the award of the arbitrator, while the arbitrator cannot enforce their award. It is this intersection of their functions and powers that necessitates their co-existence in the same legal space.¹⁷⁹ It is now commonly accepted that for both arbitration and litigation to thrive, the judge must trust the arbitrator to perform their duty in accordance with the parties' arbitration agreement and the law, and be willing to enforce the decision made by the

176. Article III New York Convention; Article 35 Model Law; Article 31 OHADA UAA; section 57 Ghana ADRA.

177. Subsequent chapters on specific jurisdictions examine some of these cases in detail.

178. For example, Article 24 OHADA UAA empowers the arbitrator to grant 'provisional enforcement' of the award if so requested by a party; and section 31(9) Ghana ADR Act empowers the arbitrator to *sub poena* witnesses.

179. For a detailed analysis of this co-existence see, Emilia Onyema, 'The Jurisdictional Tensions between Domestic Courts and Arbitral Tribunals' in Andrea Menaker (ed) *International Arbitration and the Rule of Law: Contribution and Conformity*, ICCA Congress Series No. 19, (Kluwer 2017) 481-500.

arbitrator, in accordance with the relevant laws applicable to the particular reference.¹⁸⁰

§1.04 THE WAY FORWARD FOR COURTS IN AFRICA

African States can be said to have fully embraced modern arbitration particularly for the resolution of cross border commercial disputes. This acceptance is evidenced by the provisions of their arbitration laws; the adoption of modern arbitration rules in the continent; greater awareness of the arbitral institutions operating in the continent and their work;¹⁸¹ increase in Africa-focused arbitration publications;¹⁸² increase in the number of arbitration related conferences taking place in Africa; and increase in the number of arbitration practitioners in the continent. These are all positive developments, and in the right direction and will all continue to grow or increase. However, questions remain around the support of arbitration from courts in the continent.

It is now well accepted that having a friendly or modern arbitration law is not enough for African States to benefit from the transformational agency of arbitration, both for their legal systems and business environment.¹⁸³ Some of the major weaknesses in the operation of the courts in Africa are well documented and will not be rehashed here.¹⁸⁴ However, one major factor which goes beyond the courts is the weak legal systems the courts operate under. This author has argued that these legal systems introduced by and inherited from the colonial powers are no longer fit for the efficient delivery of justice in this post-modern era.¹⁸⁵ It is noted that the various colonial powers have since the post-colonial period modernised their own legal systems. We

180. *Ibid.*, at 491–492; Jan Paulsson, *Why Good Arbitration Cannot Compensate for Bad Courts*, *Journal of International Arbitration*, Vol. 30, No. 4, 345–360 (2013).

181. See the list of African arbitral institutions on the ICCA website at: http://www.arbitration-icca.org/ICCA_African_Arbitral_Projects.html and the website for the SOAS Arbitration in Africa Project at: <https://www.researcharbitrationafrica.com/arbitration-institutions-in-africa> (accessed 20 December 2017).

182. See for some recent Africa focused texts on arbitration: Amazu Asouzu, *International Commercial Arbitration and African States* (Cambridge University Press, 2001); Lise Bosman (ed) *Arbitration in Africa: A Practitioner's Guide*, (Wolters Kluwer, 2013); John Miles, Tunde Fagbohunlu and Kamal Shah, *Arbitration in Africa: A Review of key Jurisdictions* (Sweet & Maxwell, 2016); C.A. Candide Johnson and Olasupo Shasore, *Commercial Arbitration Law and International Practice in Nigeria* (LexisNexis, 2012); Kariuki Muigua, *Settling Disputes Through Arbitration in Kenya*, (Nairobi: Glenwood Publishers Ltd, 2012); Won Kidane, *China-Africa Dispute Settlement: The Law, Economics and Culture of Arbitration* (Wolters Kluwer, 2012); Paul O. Idornigie, *Commercial Arbitration Law and Practice in Nigeria* (Abuja: LawLords Publications, 2015); Adedoyin Rhodes Vivour, *Commercial Arbitration Law and Practice in Nigeria Through the Cases* (LexisNexis, 2016); Paul Ngotho, *Contemporary Issues in Arbitration*, (Nairobi: Homecoming Publications, 2016); Emilia Onyema (ed), *The Transformation of Arbitration in Africa: The Role of Arbitral Institutions* (Wolters Kluwer, 2016).

183. This includes the full participation of African arbitrators, African law firms, African arbitration institutions and African cities in international arbitration. See also, Emilia Onyema, *supra* n. 179, at 500.

184. See for example, the papers delivered at the 2nd SOAS Arbitration in Africa Conference on the role of courts and judges in arbitration which held in Lagos, 22–24 June 2016 and available at: <http://eprints.soas.ac.uk/22727/>.

185. Emilia Onyema, *supra* n. 179, makes this argument with a particular focus on West African States though the same may be said for all other colonised African States.

must also recognise that the inherited colonial legal systems were not originally designed to serve the purposes or development of these African States. They were designed to serve the interests of the colonialist States and their nationals. It is therefore surprising that post-colonial African States continue to maintain these colonial systems and structures. There is need for reform. Arbitration can lead or at least support this reform particularly as it relates to the resolution of commercial disputes.

This section very briefly explores how issues of delay in justice delivery before the courts in Africa (section A) and unspecialised judiciaries in Africa (section B) can be reformed with particular reference to arbitration matters, in support of this reform proposition. It also briefly engages with the lack of access to published decisions of courts in Africa on arbitration related matters which makes analysing the attitude of such courts more difficult (section C). The author recognises that each of these issues require extensive research and reform proposals.

[A] Reducing Delays

One of the reasons arbitration (for both domestic and cross border commercial disputes) is very attractive in Africa is the delays experienced in the judicial system. It is not unusual for a commercial dispute to take two or more years to resolve at the first instance court level, before the ‘journey’ through the Court of Appeal and the Supreme or Constitutional courts for a final determination. Arbitration on the other hand will typically take less than two years for the dispute to be determined and an award published to the parties for their performance. It is only when the award is challenged or not complied with (so that its enforcement is sought before the courts) that the ‘journey’ through the court system commences. The import of this is that disputants can conclude the dispute resolution process within this short span of time if there is no recourse to the courts.

It is well accepted that commercial parties do not wish to get locked in litigation, which is one of the major reasons they opt for arbitration in the first instance.¹⁸⁶ The issue that needs exploring is how delays, in the courts, after the arbitral award is published, can be reduced or eliminated.¹⁸⁷ At this stage, the decision over the substantive dispute has been made by the arbitral tribunal; the grounds for challenge of arbitral awards either under the New York Convention or national laws are limited and similar. It is therefore accepted under the laws of African States that arbitral awards are final and binding and will be reviewed on limited grounds, so why the delay? The answer to this question lies in the exigencies of the legal systems and legal

186. Queen Mary University of London 2015 International Arbitration survey, ‘Improvements and Innovations in International Arbitration’.

187. The issue of court intervention during the arbitration proceeding is judicial over reach since the vast majority of arbitration laws in Africa provide for arbitrator and party autonomies during this stage of the reference. It is for the disputants (and their lawyers) to take some responsibility and not ‘invite’ the courts into the reference at this stage. There may be legitimate court interference for example when the arbitrator is challenged. Arbitration laws can provide for arbitrator challenge decisions to be made by the appointing authority and if by the court, expressly limit the opportunities for appeals from such decisions.

practices in these jurisdictions. Delay in the judicial process is not peculiar to arbitration matters. Possible solutions to the problem of delay will therefore need to be holistic and a full discourse goes beyond the remit of this chapter. However, it will be appropriate to express a view on court intervention in certain aspects of the arbitral process, for example the appointment of arbitrators and support during the arbitration proceeding, which will reduce possible delays during the arbitral reference.

In relation to arbitrator appointment, the current law and practice in most African jurisdictions is for the national court to assist with the appointment of the arbitrator where the appointment procedure of the parties fail or in default of appointment. Bearing in mind that delay infects the judicial process and legal system, the aim of alternative structures may be either to limit, or completely remove court participation at the stage of the appointment of arbitrators. In this author's view, the better view will be the latter option. African jurisdictions can adopt the appointing authority structure and remove this task of arbitrator appointment from the purview of national courts. National arbitration laws can include default appointing authorities which can be the major arbitration centres/institutions operating in that jurisdiction or a court-annexed arbitration support agency (e.g., the Arbitration Centre provided for in the Ghana ADR Act¹⁸⁸).

This is because such organisation whose core business is dispute resolution will have the relevant expertise to properly and professionally dispose of this obligation, and the courts can rely on the expertise of such organisations. The organisation, apart from being a neutral agency, will also have access to the expertise and knowledge of likely appointees which the courts may lack. Arbitrator appointment is an administrative task which arbitration institutions are well suited to make. If a particular jurisdiction considers arbitrator appointment of such importance that its courts must retain jurisdiction to assist the parties with such appointment, then such jurisdictions should consider limiting the appointment decision to one level of court with either no or limited review by another level of court without any right of further review or appeal to higher courts. The same process should apply to arbitrator challenge matters. The suggestion therefore is to limit such decisions to an appointing authority whose decision may be reviewed by a first instance court (e.g., a High Court) without further right of appeal to higher courts. In the alternative, if the decision is made by the Court of First Instance, then this should be final without any further appeal to higher courts.

In relation to court assistance during the arbitration proceedings, African jurisdictions may consider legislating to empower the arbitrator to decide all relevant matters (except the disputants agree otherwise) that may arise during the arbitration, which the courts will immediately enforce. Such matters may include joinder of parties, consolidation of arbitration references, granting interim measures of protection, and inviting witnesses. Such a measure, will show trust in the ability of the arbitrators (and by extension support for the arbitral process) to discharge the responsibility entrusted to them by the parties (private) with the full backing or support of the State (public) through the willingness of the courts to enforce such decisions with little or no

188. The ADR Centre is yet to be constituted.

interference. The courts will also benefit from this structure because it will (at the very least) remove such matters from their dockets or cause lists at this stage. This will not deprive the courts of their jurisdiction over arbitration related matters because courts will still be engaged at the stage of challenge or enforcement of the award. The disputants will be 'forced' to honour their freely chosen mechanism of dispute resolution and fully participate in the process which will be almost self-contained (but not delocalised). Finally, this will create efficiency and evidence a seamless dispute resolution system with both processes (arbitration and litigation) working together to serve their constituents, the disputants.

[B] Creating Specialised Judiciary

One sign of the weak support for arbitration in African States is the alleged use of unspecialised judges in determining arbitration related matters. This refers to the allocation of arbitration matters for determination to judges who do not have any (or have very little) knowledge and understanding of arbitration. It is such judges that issue decisions that frustrate the arbitral reference. The key question is how each African jurisdiction can remedy this weakness. It is tempting to suggest training in arbitration for all judges in a state (section 1) or the creation of specialist arbitration chambers or divisions of courts (section 2). However, this author's view is that each jurisdiction must purposively examine its needs, available resources and competing interests to determine what option or combination of options will better serve their judicial system to implement. The key goal is providing better support to arbitration and its use in each jurisdiction.

[1] Training for Judges

Knowledge of arbitration and the substantive issues in dispute by a judge is indispensable to providing support to arbitration. Continuous training for judges is a given and there are provisions for the training of judges in each African State. The point here is for such training to incorporate knowledge of other forms of dispute resolution processes and how they complement litigation, and the role of the judge in supporting such other processes of dispute resolution. Such knowledge ideally should be included in the curriculum of law faculties in African (and non-African) universities and the various law professional courses across the continent. Embedding training in arbitration and ADR processes in such preliminary stages of the legal education will benefit, in addition to the judges, lawyers, court registrars, and other legal professionals. This will also create in the minds of these professionals a seamless dispute resolution ecosystem. The essence of any continuous professional training is to inform and keep participants updated on developments in the profession. This is mandatory not just for judges but all legal professionals who support the judges in their function. This training can also be conducted on a continent wide or regional basis to enable the judges also share their experiences with their colleagues from other African States. This will reassure arbitration consumers of access to qualitative judiciaries on the continent because the

knowledge acquired through such training will be evident in their decision-making process and reasoning as contained in their judgments.

In addition, there are several tools available to judges to enable them to effectively discharge these duties, particularly as it relates to international arbitration, New York Convention awards or UNCITRAL Model law inspired laws. These resources are also freely available online and judges can refer to such resources to assist them with making their decisions. These resources include the New York Convention dedicated website;¹⁸⁹ the UNCITRAL CLOUT;¹⁹⁰ and the many commentaries on arbitration related matters. Going further, judges can be influenced by the interpretations of these international documents given by other courts and apply them to their domestic arbitration regimes as well and where appropriate. This assures the positive influence of domestic arbitration law and even the litigation system by the international arbitration regime. This is particularly relevant in the context of efficiency and qualitative decision-making.¹⁹¹

[2] *Establishing Specialist Arbitration Courts*

The creation of specialist arbitration courts that will hear only arbitration cases has been suggested as one remedy for the problem of unspecialised judiciary.¹⁹² Creating specialist court divisions has resource implications for states generally. And for most African States, with very weak economies and several other issues (such as security) competing for scarce national resources, specialist court divisions (for arbitration matters) may just not be affordable or top of the agenda of the various governments. In addition, doing a cost-benefit analysis, it may be difficult to justify sinking such resources to constitute specialist arbitration courts in the face of other competing demands which will impact immediately and directly on the wellbeing of most of the local population. This is primarily because of the number of disputes. We must ask the question: how many arbitration related disputes do such judiciaries adjudicate in any given period as compared to other subject matters, to justify dedicating such resources to providing dedicated arbitration courts? Mauritius is one African State with specialist arbitration courts. This is understandable for Mauritius whose government has a clearly defined policy to make Mauritius a hub for international arbitration in Africa.

189. This website is dedicated to New York Convention resources: <http://www.newyorkconvention.org/>. Another very useful resource is: Emmanuel Gaillard and George A. Bermann (eds), *The UNCITRAL Secretariat Guide on the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, New York, 1958* (Brill/Nijhoff, 2017). International Council for Commercial Arbitration (ICCA) also conducts New York Convention Road shows and for more information on this, see http://www.arbitration-icca.org/NY_Convention_Roadshow.html.

190. CLOUT is the acronym for Case Law on UNCITRAL Texts and is a free resource available online at: http://www.uncitral.org/uncitral/en/case_law.html.

191. See Emilia Onyema, *Regional Arbitration Institution for ECOWAS: Lessons from OHADA Common Court of Justice*, *Int'l Arb Law Review*, Vol. 17, No. 5, 99–111 (2014), for an expansive discussion of these issues.

192. See Chapter 9 below on the positive impact of such specialist chambers on international arbitration in Mauritius.

The Government of Mauritius heavily supported the 23rd ICCA Congress; the UNCTRAL (Mauritius) Convention on Transparency in Treaty-based Investor-State Arbitration; and supports the LCIA-MIAC Arbitration Centre. It also makes sense for Mauritius to boost its tourism and financial services sectors with such a hub, and so fit its economic model. This is not the situation for the vast majority of African States. For example, security of lives and property may be more important to the countries of North, East, West and Central Africa with various terrorist organisations operating in those areas of the continent and creating insecurity of the lives and properties of their citizens.

It will definitely be more realistic for most of these jurisdictions to develop specialist commercial courts with judges having expertise in a broad range of commercial matters including arbitration.¹⁹³ Some African States such as Ghana, Uganda, Rwanda, Egypt and Morocco have commercial divisions in their High or superior Courts.¹⁹⁴ Depending on the particular needs and conditions of each State, at the minimum, there should be commercial divisions of their superior courts with well-trained judges in various aspects of substantive commercial law and practice along with training in the law and practice of arbitration and its role in their legal system and the economic development of the particular State. Such training will influence the interpretative tools that such judges deploy in dealing with these matters. In this way, where such courts have few arbitration matters, the judges can still effectively and efficiently determine commercial disputes that are not arbitrated but litigated before them.

Another suggestion that has been mooted (at various conferences) is giving Courts of Appeal original jurisdiction over arbitration matters as is the case in some African jurisdictions.¹⁹⁵ The difficulty with this suggestion is that in most African jurisdictions, this will require constitutional amendments; which is a feat. This is because the competence of the courts is contained in the Constitutions and any subsidiary law limiting such competence will be invalid for being at variance with the constitutional provisions. It will be necessary to explore whether the removal of competence over arbitration matters from courts of first instance is even desirable in the first place. In the view of this author, as it relates to the enforcement or challenge of international or foreign arbitral awards, original competence in the Court of Appeal may assist with the quality of the decisions made. It will also impact on the time spent

193. Refer back to the paper given by Chief Justice Allsop in note 86 above on the need for commercial courts that are ‘international in outlook, commercial in skill and arbitration sympathetic’.

194. Mauritius under its International Arbitration Act 2008 operates a ‘Designated Judges’ system which refers to specially trained judges of the Supreme Court that hear matters under the IAA 2008.

195. See Emilia Onyema, *supra* n. 191, at 110–111. See for African jurisdictions: the position in Algeria where challenge against an award lies with the Court of Appeal with a further appeal to the Supreme Court as provided in Article 1033 Algerian Code of Civil and Administrative Procedure. The same applies in Morocco under Law No. 05-08 Relating to Arbitration and Mediation Agreement; in Tunisia the Court of Appeal has original jurisdiction in the enforcement or setting aside of international awards in accordance with the Tunisian Arbitration Code.

pursuing such redress since there will only be one more level of appeal to the Supreme Court. However, as it relates to domestic arbitration, it may be preferable for these to commence at the Court of First Instance to give the judges in those circuit the opportunity to familiarise themselves with arbitration related applications. This is important because generally, it is judges from the first instance courts that will be promoted to the Court of Appeal and Supreme Court. They will bring with them their experience and learning from the Court of First Instance.

[C] Publishing Court Decisions

It is very difficult to find court decisions on arbitration (or general commercial law) from African States. Some States are better than others in this matter.¹⁹⁶ However, arbitration related judgments can be made more easily available by the courts themselves, some of which have their own websites. Arbitration institutions in these States can also support this task by providing (on their websites) summaries of any arbitration related decision from their courts along with a copy (or weblink to the text) of such judgment. The various young arbitrator groups in the continent can also support this task through publishing case commentaries. This will greatly assist with making such decisions publicly available and open for critique and discussion by commentators¹⁹⁷ in addition to being referred by other judiciaries and being uploaded onto the CLOUT or New York Convention databases. Decisions from the English (and other) courts for example, are well known internationally because they are easily and generally freely available online and commentaries are written on them, making them better known and often cited. In this way, the thinking of English (and other) judges greatly influence the development of international commercial and arbitration law. African judges can also contribute to this development of the law. Finally, the knowledge that their judgment and reasoning will be freely available to the general public (domestic and international) will also encourage African judges to write more rigorously argued judgments which will definitely contribute to the international arbitration jurisprudence. There is no gainsaying the fact that these 'African voices' are needed in the development of international arbitral jurisprudence.

CONCLUSION

This chapter has argued that arbitration of commercial disputes in Africa is growing and this growth will continue; that African States are beginning to accept this fact which is driven by commercial parties and arbitration lawyers in Africa; and that the judges now also accept this direction of travel and recognise that arbitration needs their full support to thrive. Importantly, this chapter argued that most of the articulated weaknesses of courts in Africa have roots in the colonial-based legal systems operating

196. For example, the decisions of South African (<http://www.saflii.org/za/cases/ZASCA/>) and Kenyan (<http://kenyalaw.org/caselaw/>) courts are available online.

197. Commentaries on arbitration related court decisions from certain African jurisdictions are becoming more frequently published which is a welcome development.

in these jurisdictions, and these systems are no longer fit for purpose and desperately need modernisation. It also suggests that each African jurisdiction will need to examine the weaknesses of its courts (or legal system) and in the context of its particular reality, determine what changes its economy can support and implement. This will be different for each State and may result in incremental development in arbitration support. Finally, it proffered various suggestions on improving efficiency in the judicial systems of African States with particular focus on arbitration related matters. There indeed is evident progress (though vacillating in some jurisdictions) in the support judges in Africa give to (domestic and international) arbitration and there is need to sustain this progress through continued training of the judges, court registrars, and legal practitioners; and increased awareness activities, not just within the legal community (of judges, lawyers, attorneys, students, academics and trainers) but also of commercial parties. Ultimately, an arbitration friendly jurisdiction is not one whose courts do not engage with arbitration but one whose laws are clearly articulated to provide a positive environment for arbitration to thrive and in which the courts are available to support both the parties and the process to ensure the attainment of its objective, which is, the fair and speedy determination of disputes.